Annual Report
2016

Oifig an Choimisinéara Faisnéise
Office of the Information Commissioner

# Information Commissioner Annual Report 2016

Office of the Information Commissioner
18 Lower Leeson Street,
Dublin 2
D02 HE97

Tel: (01) 639 5689
Email: info@oic.ie
Website: www.oic.ie

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Oifig an Choimisinéara Faisnéise
Office of the Information Commissioner

# Annual Report 2016

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# Foreword

I hereby submit my fourth Annual Report as Information Commissioner to the Dáil and Seanad pursuant to section 47(2) of the Freedom of Information Act 2014.

This is the nineteenth Annual Report of the Information Commissioner since the establishment of the Office in 1998.

**Peter Tyndall**
Information Commissioner
May 2017

# Performance Summary

## Our performance

**433**
We completed 433 reviews in 2016
See page 27

**34%**
Case completions increased by 34% over 2015
See page 27

**60%**
We completed 60% of our reviews within four months
See page 28

**99%**
We completed 99% of our reviews within twelve months

**95%**
of OIC reviews on hand at end 2016 were less than six months old

## Demand for our services

**440**
We accepted 440 applications for review in 2016
See page 26

**32%**
We accepted 32% more reviews in 2016
See page 28

## FOI usage

**30,417**

Public bodies received 30,417 FOI requests in 2016

See page 19

**73%**

of all requests were granted in full or in part

**22%**

Journalists accounted for 22% of all FOI requests made

See page 23

**39%**

Requests for nonpersonal records comprised 39% of all requests received

See page 22

## Public body compliance

**17**

We issued 17 statutory notices to public bodies to require compliance

See page 15

**24%**

of reviews were deemed refused by public bodies at both stages of the FOI request

See page 30

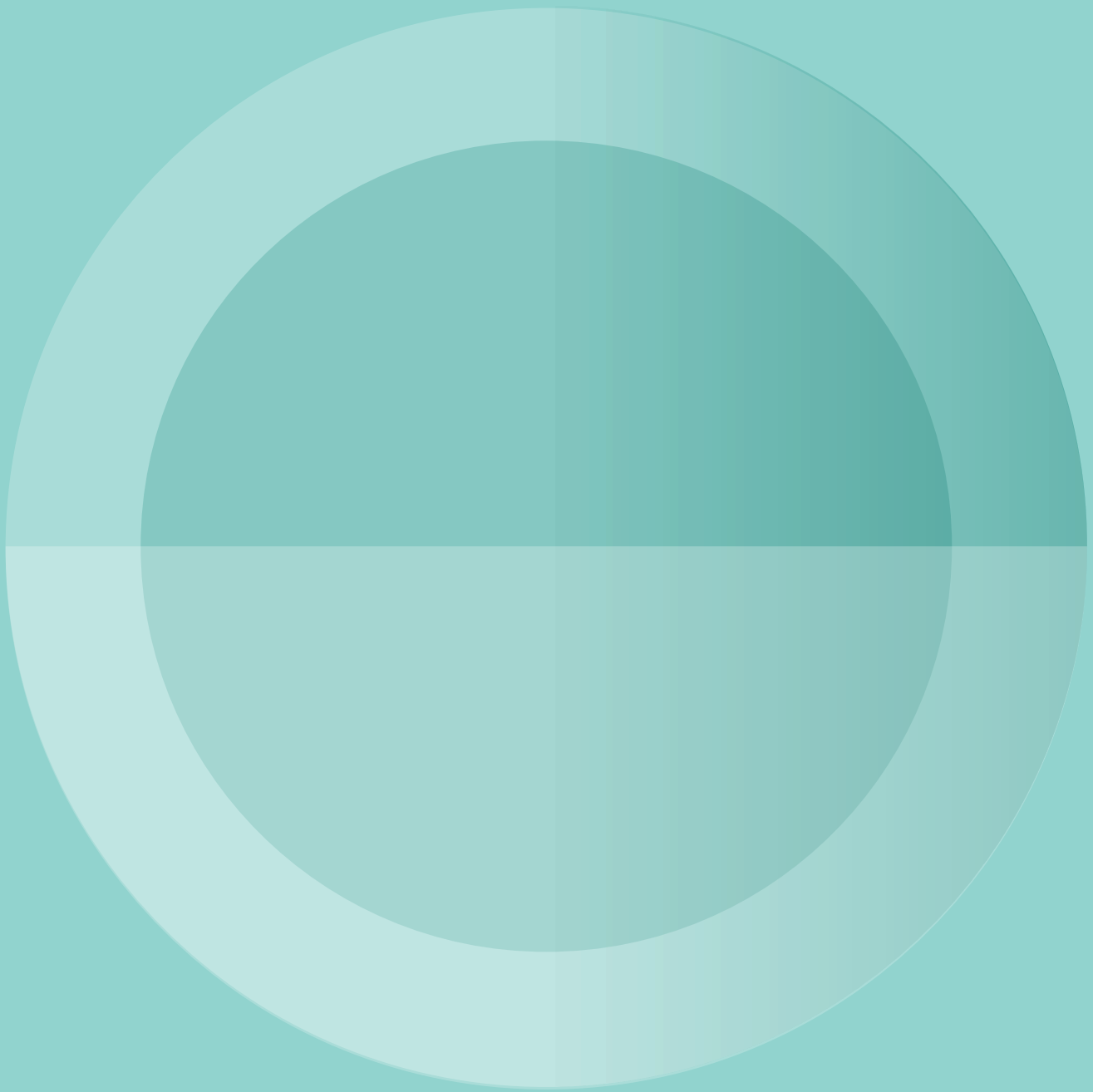
**40%**

of OIC reviews were deemed refused by public bodies at either the first or second stage of the FOI request

See page 32

Chapter 1:

# The Year in Review



# Chapter 1: The year in review

## Your right to information

### Freedom of Information

The FOI Act 2014 provides for a general right of access to records held by public bodies and also provides that records should be released unless they are found to be exempt. The Act gives people the right to have personal information about them held by public bodies corrected or updated and gives people the right to be given reasons for decisions taken by public bodies, where those decisions expressly affect them.

The primary role of the Office of the Information Commissioner is to conduct independent reviews of decisions made by public bodies on FOI requests, where members of the public are dissatisfied with responses to those requests. As Information Commissioner, I have a further role in reviewing and publishing commentaries on the practical operation of the Act.

The FOI Act applies to all public bodies that conform to the definition of public body in Section 6(1) of the Act (unless they are specifically exempt or partially exempt under the provisions of Section 42 or Schedule 1 of the Act). Bodies such as Government Departments and Offices, local authorities, the Health Service Executive, voluntary hospitals, and universities are included. As new public bodies are established, they will automatically be subject to FOI unless they are specifically exempt by order made by the Minister.

### Access to Information on the Environment (AIE)

The European Communities (Access to Information on the Environment) Regulations 2007 to 2014 provide an additional means of access for people who want environmental information. The right of access under the AIE Regulations applies to environmental information held by or for a public authority. The primary role of the Commissioner for Environmental Information is to review decisions taken by public authorities on requests for environmental information. Both access regimes are legally independent of each other, as are my roles of Information Commissioner and Commissioner for Environmental Information.

### Re-use of public sector information

In addition to the functions outlined above, the European Communities (Re-use of Public Sector Information) (Amendment) Regulations 2015 (S.I. No. 525 of 2015) provide that the Information Commissioner is designated as the Appeal Commissioner. As such, my Office can now accept applications for review of decisions taken by public bodies in relation to requests made under the Regulations to re-use public sector information, including decisions on fees and conditions imposed on re-use of such information.

## Introduction

Among the key features of the FOI Act 2014 were the removal of the requirement to pay up-front fees for making FOI requests to public bodies and the significant reduction in the cost of applying to my Office for reviews. Those changes had an almost immediate impact on FOI usage levels, which have continued to rise steadily since.

I am pleased to report that during 2016, my Office rose to the significant challenge of managing the increased demands for its services while continuing to significantly improve case turnaround times.

My Office recorded a 32% increase for the year in the number of reviews accepted when compared with 2015. Importantly, it also achieved a 34% increase in the number of reviews completed. Our impressive completion rates are due, in part, to the revised work processes we introduced in July 2014. In 2013, the last full year before we changed our processes, my Office completed 258 reviews. The completion rate for 2016, at 433, represents a 67% increase in reviews completed when compared with 2013.

We completed **60%** of our reviews within four months

My Office also met its 2016 business plan target of completing 60% of all reviews within four months. The percentage of reviews completed within four months has grown steadily since 2013, when only 26% of reviews were completed within that timeframe. It is also noteworthy that 99% of all reviews completed in 2016 were completed within twelve months.

As Environmental Commissioner, I am pleased to report on a significant improvement in case completion rates, primarily achieved as a result of my Office having recruited additional staff members specifically for the purpose of processing appeals received under the AIE Regulations. During the year, my Office completed 30 cases, an increase of 50% on 2015. However, as with FOI, demand for the services of the Office of the Commissioner for Environmental Information has also continued to rise. The ability to keep abreast of the increased demand will give rise to particular challenges for 2017 and at the time of writing, I am seeking to increase the staff resources available to carry out this work.

2016 also saw tremendous steps forward in my Office achieving one of its primary strategic objectives, namely to develop and enhance our management and administrative frameworks to enable and underpin our objectives of improving the wider public service and delivering an excellent customer focussed service.

Work has commenced on replacing and enhancing our IT systems. New websites are being developed for both the OIC and OCEI. The new websites will contain an improved online facility for submitting reviews and appeals. In 2016, my Office launched a new intranet service, designed to deliver more efficient internal communications. Towards the end of 2016, work also commenced on the development of new document management systems and case management systems. I discuss these developments in more detail later in my Report.

The removal of the requirement to pay up-front fees for making FOI requests to public bodies and the corresponding increase in usage levels meant that 2016 was also a very challenging year for public bodies. Unfortunately, the increased demand for services does not appear to have been matched by a corresponding increase in the allocation of resources by public bodies to the processing of FOI requests.

In November 2016, in an address I gave at the World Conference of the International Ombudsman Institute, I suggested that FOI has transformed public life and delivered on many of its promises. However, I warned that we must not be complacent. I noted that public finances remain stretched and I expressed my concern that many public bodies are failing to ensure that the administration of FOI, as a statutory function, is afforded as much weight as any other statutory function.

I am disappointed to report that my Office has noted ongoing and, in some cases, increasing examples of some public bodies failing to meet the statutory requirements of the FOI Act. For example, later in my Report I comment on the number of occasions that public bodies have not responded to FOI requests within statutory timeframes and on the fact that my Office noted an all-time high of instances where the request was deemed to have been refused by the public body in the absence of a timely decision. I also report on several instances where my Office had to issue statutory notices to ensure compliance with the Act.

In my Report for 2015, I commented upon the extension of the FOI Act to a number of public bodies that had been previously excluded and I mentioned that I expected to see the first application for review regarding An Garda Síochána in 2016. However, I did not expect that I would, for the first time, have to consider using my new statutory power to apply to the court for an order to oblige compliance with my decision in a case involving An Garda Síochána. I am pleased to report that it did not eventually come to that and I report on the case in more detail in Chapter 2.

In 2016, as Appeal Commissioner, I received the first appeal under the European Communities (Re-use of Public Sector Information) (Amendment) Regulations 2015. While there is no statutory requirement that I report on my activities as Appeal Commissioner, I have set out a brief summary of the matter later in Chapter 2.

As will be clear from my comments above, I am very pleased with the significant outcomes my Office has achieved during 2016. I want to highlight and acknowledge the work of the staff of the Offices of the Information Commissioner and the Commissioner for Environmental Information. My staff approach their work with high levels of professionalism, dedication and determination, to ensure that our services to all our stakeholders are continually improved and delivered to the highest standards and I am very grateful for their efforts. I also want to acknowledge the excellent work of the staff engaged in providing critical support services for my Office.

**Peter Tyndall**
**Information Commissioner**
**Commissioner for Environmental Information**

# Office developments in 2016

## Strategic Plan 2016-2018

My Office published its three year Strategic Plan in March 2016. The Plan sets out our key objectives for the next three years and aims to build upon the many successes we have already achieved over the course of the previous strategic period.

The plan identifies the core values that help to shape the way in which we deliver our services and that underpin everything we do. It details a number of innovative process initiatives aimed at delivering upon our vision of "a public service that is fair, open, accountable and effective".

Each year of the plan is supported by detailed annual business plans. For 2016, the business plan focussed in particular on extending and improving the impact of my Office on the wider public service, on continuously improving the level of services we provide, and in ensuring that our systems and processes allow us to deliver on those objectives. I have set out below some details of how my Office is delivering on those objectives. A copy of the plan can be found on our website at www.oic.ie.

## Guidance Material

In 2015 my Office commenced the publication of a series of guidance notes relating to the FOI Act. Progress on the guidance notes continued throughout 2016. By the end of the year we had published guidance notes on fourteen separate topics.

The guidance notes provide a commentary on the interpretation of various provisions of the FOI Act. They explain the approach my Office takes to the application of the provisions and provide examples from some of my decisions and those of my predecessors. They also include references to relevant court judgments.

In addition to the guidance notes on various exemptions in the FOI Act, notes have also been published on the provisions of the Act that afford people the right to have personal information amended (section 9) and the right to be given reasons for decisions taken by FOI bodies (section 10).

While notes of this nature can provide general guidance only, they should be of assistance to FOI bodies and to users of FOI. We intend to continue in our efforts to develop and publish guidance on all relevant aspects of the Act.

During 2016, we invited representatives from all Government Departments to an information session in order to draw attention to the potential benefits of the notes to their decision makers and to those charged with preparing submissions for my Office. We also used the session as an opportunity to seek feedback on the experiences of the bodies in their use of

the notes. It was very encouraging to hear that the notes have been warmly welcomed and are being used as a valuable resource for decision makers.

During 2016 my Office also published a suite of sample questions for FOI bodies which may be relevant when I am reviewing a decision under the FOI Act. The document was primarily intended for use by my staff to determine the amount of detail they should seek from public bodies when requesting submissions on cases. However, as the public bodies may also find these questions useful, both in responding to requests from my Office and in their own decision-making, we decided to publish the full suite of sample questions.

## Progress on ICT systems

Up to date ICT systems and infrastructure are critical to delivering on our objectives of providing an excellent customer focussed service and improving the wider public service. Implementation of our extensive ICT renewal and improvement plan saw significant progress on the replacement of outdated ICT infrastructure and the procurement of new systems to handle applications for review and our relationships with our customers and stakeholders.

Successful delivery of an extensive new ICT infrastructure in 2016 has provided the building blocks to progress our plans for a complete update of our key ICT systems. Procurement of a new customer relationship management (CRM) system and document management system (DMS) were a significant focus for 2016. The new DMS will handle non-case related documents and is expected to go-live in early 2017. Procurement of our new CRM system was finalised at the end of 2016. Summer 2017 will see the launch of this system. Significant work has been undertaken to ensure that we successfully harness these new technologies to deliver better customer service and knowledge management. Both of these new systems will facilitate the digitisation of services where appropriate and the automation of routine tasks that will support the delivery of a more effective and efficient service.

Work commenced in 2016 on a new OIC website that will facilitate the delivery of enhanced online services for both members of the public and other stakeholders in 2017. The current decisions search facility on our website is used extensively and has been identified as a significant resource for both FOI requesters and decision makers. An enhanced search facility will be a key feature of the new website. In addition, the website will include an online portal offering a fast and efficient facility to submit and manage applications for review online. It will also address the requirement identified by our customers for a quick and secure facility to transfer data and documents to us. We will continue to engage with our stakeholders to ensure that our online facilities meet their needs and to work towards a system that will be capable of streamlining interactions between all stakeholders in the FOI process.

## Irish Human Rights and Equality Commission Act 2014

The Irish Human Rights and Equality Commission Act 2014 introduces a positive duty on public bodies to have due regard to human rights and equality issues. My Office is committed to providing a service to all clients that respects their human rights and their right to equal treatment. This is equally applicable to how we interact with our own staff as it is essential in fostering a healthy work environment that promotes engagement, openness and dignity in the work place. Our approach is underlined by our core organisational values of independence, customer focus and fairness, which are evident in both the culture of our Office and our internal policies and practices. We have been proactive in providing training to our staff, which encourages them to bring a human rights perspective to their consideration of cases.

## Statutory notices issued to public bodies

### Notices issued under section 23 of the FOI Act

We issued **17** statutory notices to public bodies to require compliance

Where I consider that the reasons given by a public body in support of a decision to refuse to grant an FOI request are not adequate, I am empowered, under section 23, to direct the head of the body to issue a more comprehensive statement of its reasons for the decision. Under section 13, a decision to refuse a request must include:

- the reasons for the refusal,
- any provisions of the FOI Act pursuant to which the request is refused,
- the findings on any material issues relevant to the decision, and
- particulars of any matter relating to the public interest taken into consideration for the purposes of the decision.

Where my Office considers the details in an original and/or internal review decision to be inadequate, we may write to the head of the body concerned requiring a fuller statement of reasons for the decision to be issued both to the applicant and to my Office.

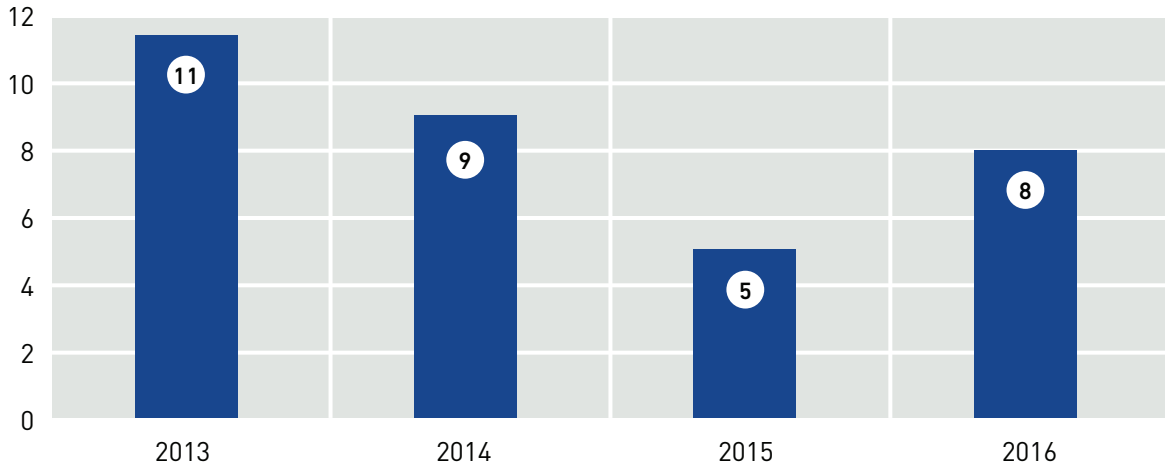
In 2016, we issued notices under section 23 to the heads of the following public bodies:

- HSE
- Cork County Council
- Dublin City Council
- Fingal County Council
- Limerick City and County Council
- Mayo County Council
- Department of Communications, Energy and Natural Resources
- Department of Foreign Affairs and Trade
- RTÉ

In all cases, we considered that the original and/or internal review decisions fell short of the requirements of the FOI Act and we sought a more detailed statement from the public body to be provided within three weeks. The requested statements issued within the required time-frame.

## Notices issued under section 45 of the FOI Act

Under section 45, I can require a public body to provide me with any information in its possession or control that I deem to be relevant for the purposes of a review. During the year, my Office issued eight notices under section 45; three to the HSE, two to TUSLA - Child and Family Agency, and one each to the Adelaide and Meath Hospital, Wexford County Council and University College Dublin. I have provided more details on each case below.




## HSE (i)

On 30 May 2016, my Office asked the HSE to provide certain information relating to its claim for exemption of certain records and to the searches it had undertaken to locate all relevant records. The review could not proceed without the information sought. The HSE's response was due by 6 June 2016. Despite a number of subsequent reminders, the HSE failed to

provide the relevant information. On 16 September, my Office issued a notice under section 45 to the Director General of the HSE and a reply was received on 26 September 2016. It is difficult to understand how the HSE found it so difficult to provide information that it was subsequently able to provide reasonably quickly upon receipt of a section 45 notification.

## HSE (ii)

My Office wrote to the HSE on 7 November 2016 and asked it to provide the applicant with an explanation of its position with regard to her request for her medical records as it had failed to issue an internal review decision on her request. As no reply was received, we issued a section 45 notice to the Director General on 29 November 2016, requiring the information to be provided within seven days. However, this deadline also passed without a reply and we were in the process of issuing a formal request for the Director General to attend before me when we eventually received a reply on 20 December 2016.

## HSE (iii)

On 19 May 2016, my Office issued a notice under section 45 to the Director General, wherein we explained that a request for the records that were the subject of the review were outstanding since 28 April and that we were unable to proceed with the review until the records were received. The records were eventually forwarded to my Office on 21 June 2016.

## TUSLA - Child and Family Agency (i)

TUSLA was requested to provide copies of the subject records for a review, on 14 April 2016. Despite a further telephone reminder the records were not forwarded to my Office. On 4 May 2016, we issued a section 45 notice to the Chief Executive of TUSLA and the records in question were delivered almost three weeks later.

## TUSLA - Child and Family Agency (ii)

My Office wrote to TUSLA on 13 June 2016 and requested copies of the relevant subject records within ten working days. On 27 June an incomplete set of records was received. On 15 July, my Office issued a section 45 notice to the Chief Executive, again requesting the relevant records. While TUSLA delivered a further set of records on 29 July, they were not the ones requested. As a result, on 8 August, we took the unusual step of issuing a second section 45 notice to the Chief Executive. We received the correct records on 11 August, two months after the original request.

For the sake of completeness, I should add that the number of records at issue was exceptionally large. Had my Office been made aware of that fact at an early stage, we may have been in a position to come to a more practical arrangement with TUSLA regarding the submission of the records.

### Adelaide and Meath Hospital incorporating the National Children's Hospital

On 29 April 2016, my Office sought copies of the relevant subject records from the Hospital's FOI Unit, to be provided by 16 May 2016. A response was not received. On 1 June 2016, my Office issued a section 45 notice to the Chief Executive of the hospital and formally required the hospital to provide the records within seven days. Further correspondence between my Office and the Hospital followed arising from some confusion about the records sought. We received the records on 23 June 2016.

### Wexford County Council

On 25 July 2016, my Office sought clarification from the Council as to the basis on which it had calculated estimated search and retrieval and photocopying fees for processing a request. However, a reply was not received within the time-frame specified or following reminders that the information was outstanding. In November 2016, my Office issued a section 45 notice to the Chief Executive of the Council, in which his attention was drawn to the fact that more than three months had passed since the initial request for clarification. The information sought was eventually submitted on 2 December 2016, more than four months after the initial request.

### University College Dublin (UCD)

On 9 December 2016, my Office issued a section 45 notice to the President of UCD as a response to a request for clarification of certain matters relating to the review was outstanding since 24 October 2016.

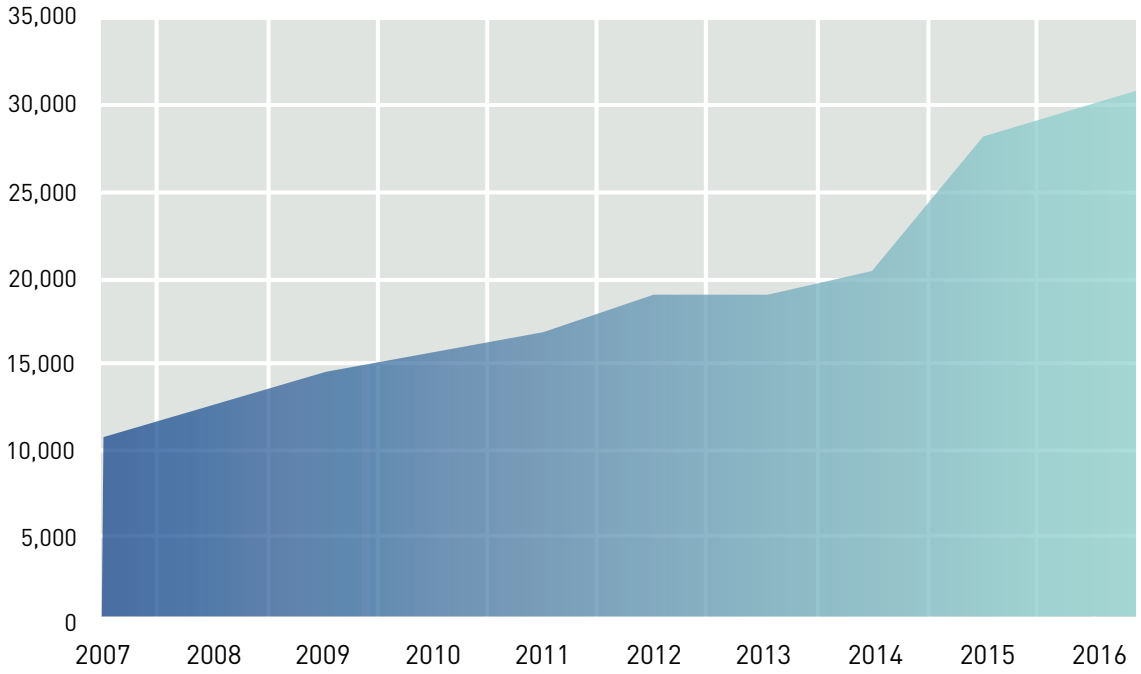
## Key FOI statistics for the year

I have included below some key details on FOI usage in 2016. A more detailed breakdown is provided in Chapter 4.

I wish to acknowledge the work undertaken by the lead agencies that collect statistics for inclusion in my Annual Report. Unfortunately, Dublin City University, as the lead agency for the Colleges of Education and the National College of Art and Design was unable to provide statistics on behalf of those bodies as it was apparently unaware of its responsibility for collating the information required as a lead agency. My Office will be liaising with the Central Policy Unit of the Department of Public Expenditure and Reform to ensure that this information is collated and returned for 2017.

It is noteworthy, nevertheless, that the number of FOI requests recorded for the bodies in question has historically been low (53 FOI requests were recorded for 2015).

## Number of FOI requests to public bodies 2007-2016




As the graph above indicates, there has been a sharp and continuous increase in the number of requests received since 2014. The total number of requests received by public bodies in 2016 was 30,417, representing an increase of 8% on the number received in 2015 and an increase of 50% on the number received in 2014.

This is a clear indicator of the effect that the elimination of up-front fees in 2014 has had on usage levels.

Public bodies received **30,417** FOI requests in 2016

The number of requests on hand within the public bodies has increased from 5,337 at the beginning of the year to 6,018 at the end of the year, an increase of 12%. While the bodies have processed a larger number of requests during 2016, they have not been able to keep up with the increased demand.

As I stated in my introduction, this suggests that the increased demand for services does not appear to have been matched by a corresponding increase in the allocation of resources by public bodies to the processing of FOI requests. This is a matter of ongoing concern for my Office and I would again urge the bodies to make every effort to ensure that the resources afforded to the processing of FOI requests are sufficient to deal with the demand levels.

## Top ten bodies who received most requests during 2016

| Placing | Public body | | 2016 |
|---|---|---|---|
| 1 | Health Service Executive | | 8,719 |
| | HSE South | 3,285 | |
| | HSE West | 2,958 | |
| | HSE Dublin North East | 1,050 | |
| | HSE Dublin Mid-Leinster | 849 | |
| | HSE National Requests-Corporate | 577 | |
| 2 | Department of Social Protection | | 2,089 |
| 3 | Tallaght Hospital | | 834 |
| 4 | TUSLA - Child and Family Agency | | 827 |
| 5 | Irish Prison Service | | 778 |
| 6 | St James's Hospital | | 585 |
| 7 | Department of Justice and Equality | | 583 |
| 8 | Dublin City Council | | 512 |
| 9 | Department of Education and Skills | | 494 |
| 10 | An Garda Síochána | | 459 |

## Sectoral breakdown of FOI requests to public bodies

29% Health Service Executive

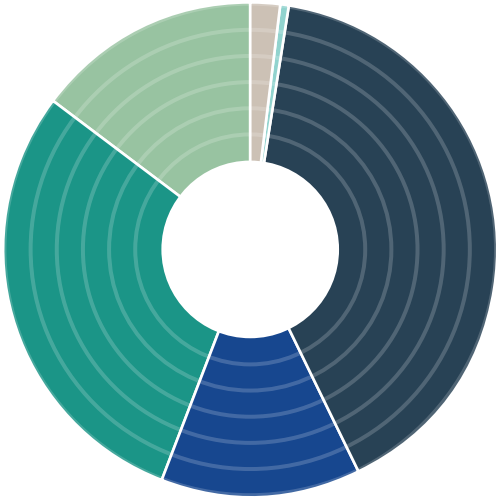
14.5% Voluntary Hospitals, Mental Health Services and Related Agencies

2% Third Level Institutions

0.5% Other Voluntary Bodies

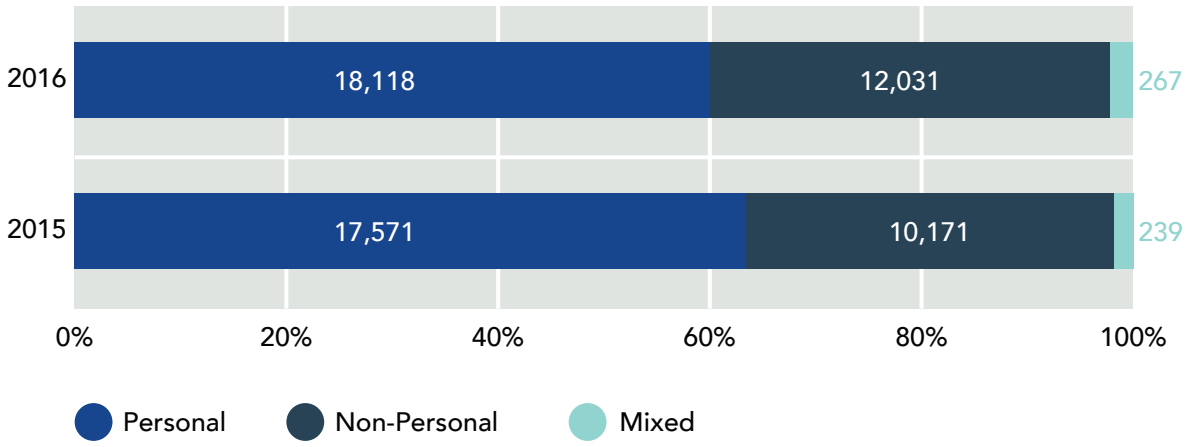
40% Govt. Depts. and State Bodies

13% Local Authorities



- The majority of Government Departments recorded marginal increases in the number of FOI requests made in 2016.
- Requests to the Department of Transport, Tourism and Sport increased by 24% in 2016. The Department has recorded a 225% increase in the number of requests received since 2014. Of the 302 requests received in 2016, more than 60% were submitted by journalists. The Department attributed the large increase in requests to a number of high profile matters arising during the year, including the alleged sale of Irish Olympic tickets at the Olympic Games in Brazil, the tragic death of a mixed martial arts fighter, and industrial disputes concerning the LUAS and Bus Éireann.
- Requests to An Garda Síochána rose from 183 in 2015 to 459 in 2016, representing a 150% increase.
- Requests to the Department of Justice and Equality decreased by 38% compared with 2015.
- Requests to Local Authorities in 2016 have increased by 147% since 2014.

## Type of request to public bodies

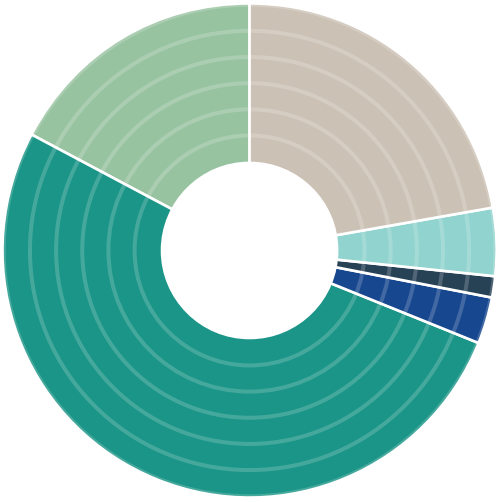



Requests made in 2016 for non-personal records continued the upward trend of recent years. 22% of all requests received in 2014 were for non-personal records, while that percentage rose to 39% in 2016. This is most likely as a result of the elimination of up-front fees for making requests in late 2014.

Requests for non-personal records comprised **39%** of all requests received

## Category of requester to public bodies

- 51% Clients of public bodies
- 17% Others
- 22% Journalists
- 4.5% Business
- 1.5% Oireachtas members
- 3% Staff of public bodies

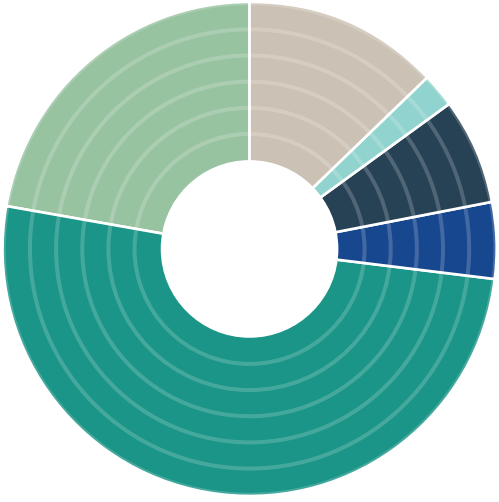


The ratios for types of requester are similar to those reported on in 2015, with a slight increase in use by journalists from 20% to 22%.

Journalists accounted for **22%** of all FOI requests made

## Release rates by public bodies

- 51% Granted in full
- 22% Part-granted
- 13% Refused
- 2% Transferred
- 7% Withdrawn
- 5% Handled outside FOI



2016 saw a slight increase in the percentage of requests refused over 2015, rising from 10% to 13%. More information on release rates can be viewed at table 5, Chapter 4.

**73%** of all requests were granted in full or in part

## Estimated overall cost for FOI requests in 2016

In March 2016, the Central Policy Unit issued instructions to public bodies for the completion of FOI statistical returns. For the first time, the instructions included details on how to estimate the true cost of processing FOI requests, based on an analysis of a percentage of requests received. Public bodies were requested to submit returns.

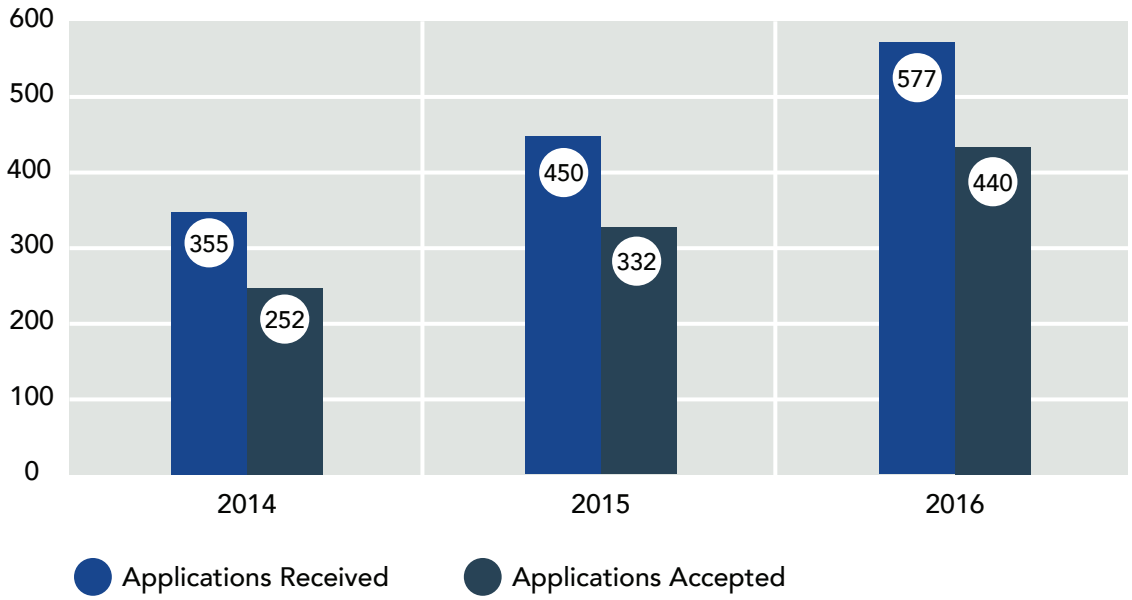
However, the information provided to my Office suggests that many bodies did not provide the requested information. Furthermore, there are some inconsistencies in the manner in which some bodies have reported and/or calculated their estimates. My staff intend to seek clarification of the matter with the Central Policy Unit during the year.

## Office of the Information Commissioner (OIC) caseload

An application for review can be made to my Office by a requester who is not satisfied with a decision of a public body on an FOI request. Decisions made by my Office following a review are legally binding and can be appealed to the High Court only on a point of law.

We accepted **440** applications for review in 2016

## Applications to OIC 2014 - 2016



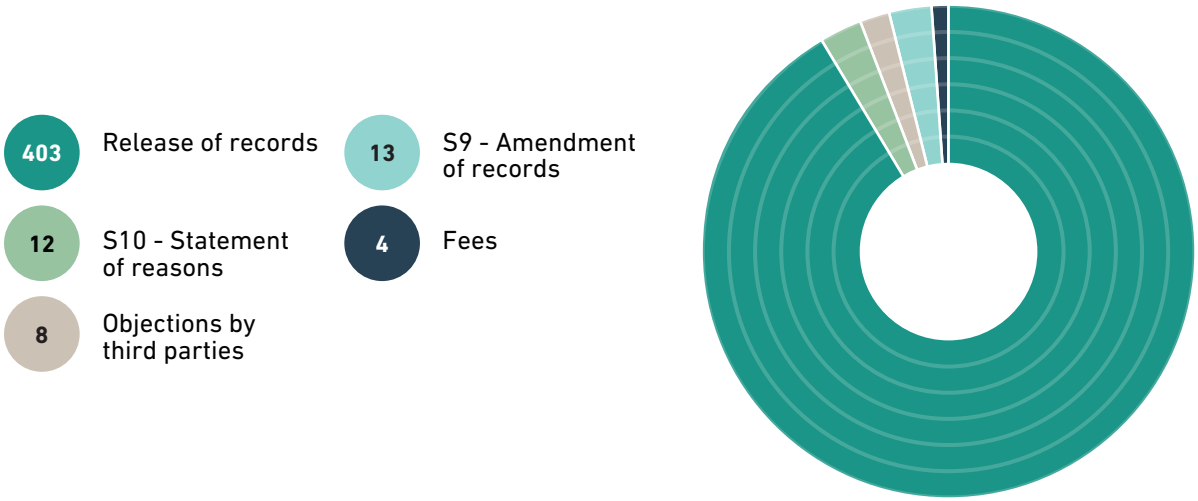

2016 was an extremely busy year for my Office. We recorded a 28% increase in applications for review received over 2015. The increase is even more dramatic when compared with the number recorded for 2014. The 577 applications received in 2016 represent a 62% increase on the number of applications received in 2014.

The number of applications accepted each year is invariably lower than the total number received. This is primarily due to the fact that some applications are deemed by my Office to be invalid or premature (i.e. the application for review has been made to my Office before the full FOI process has been concluded by the public body).

We accepted **32%** more reviews in 2016

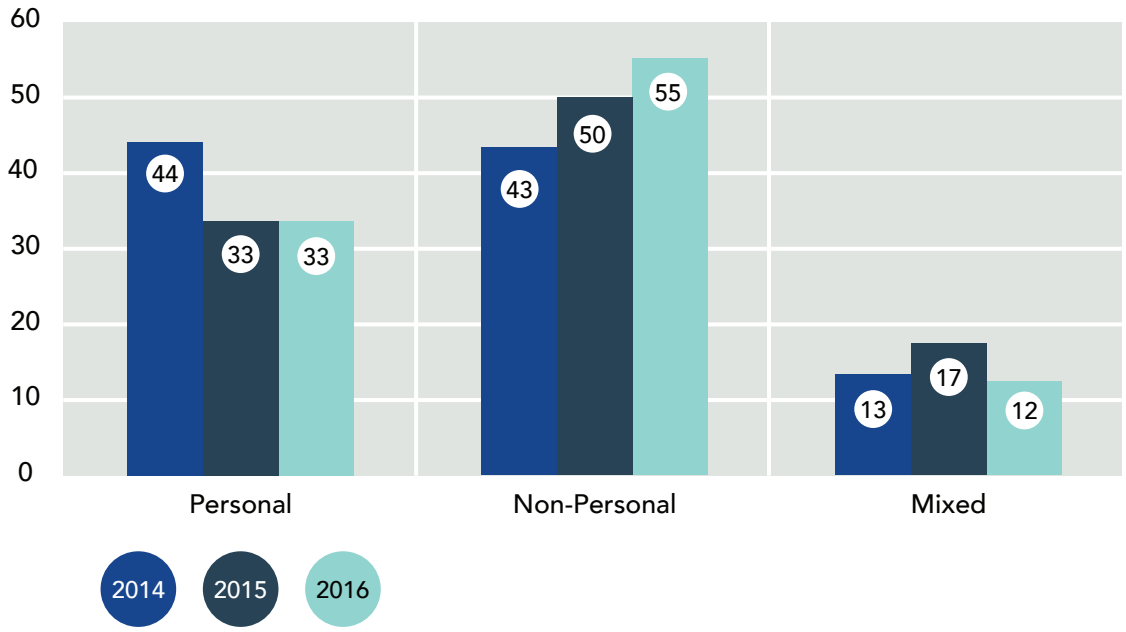
The number of applications which were accepted for review by my Office in 2016 increased by 32% over 2015. In 2016, 76% of all applications made to my Office were accepted for review, whereas the accepted figure for 2014 was 71%.

## Subject matter of review applications accepted by OIC



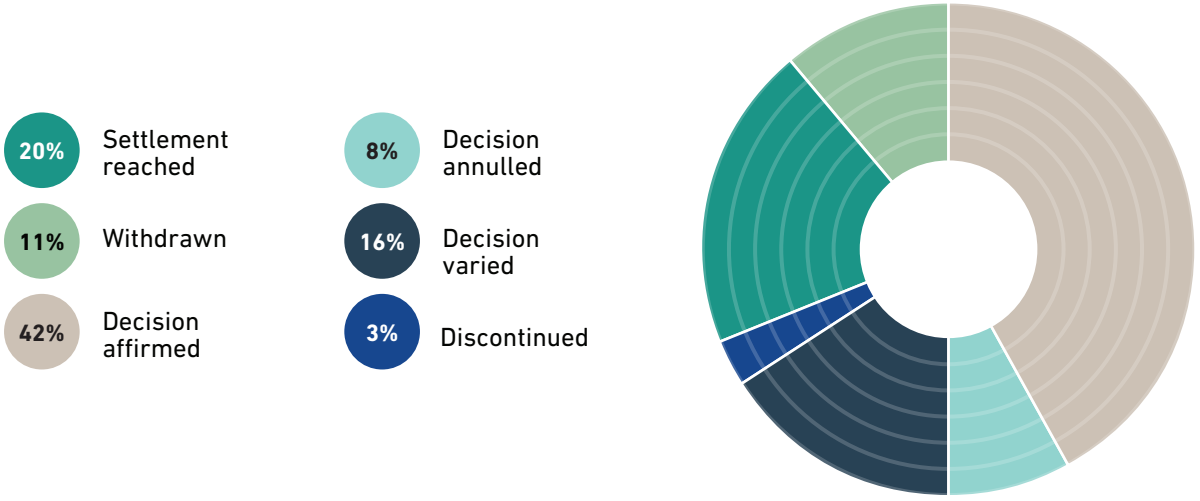

Of the 440 applications accepted by my Office in 2016, 92% were concerned with refusals by the bodies to grant access (in part, or in full) to some or all of the records sought.

## Percentage of applications accepted by OIC by type 2014 – 2016




An application recorded by 'type' indicates whether the applicant is seeking access to records which are of a personal or non-personal nature, or a mix of both. The percentage figure for access to non-personal records in 2016 is the highest since 2010.

## Outcome of reviews by OIC in 2016

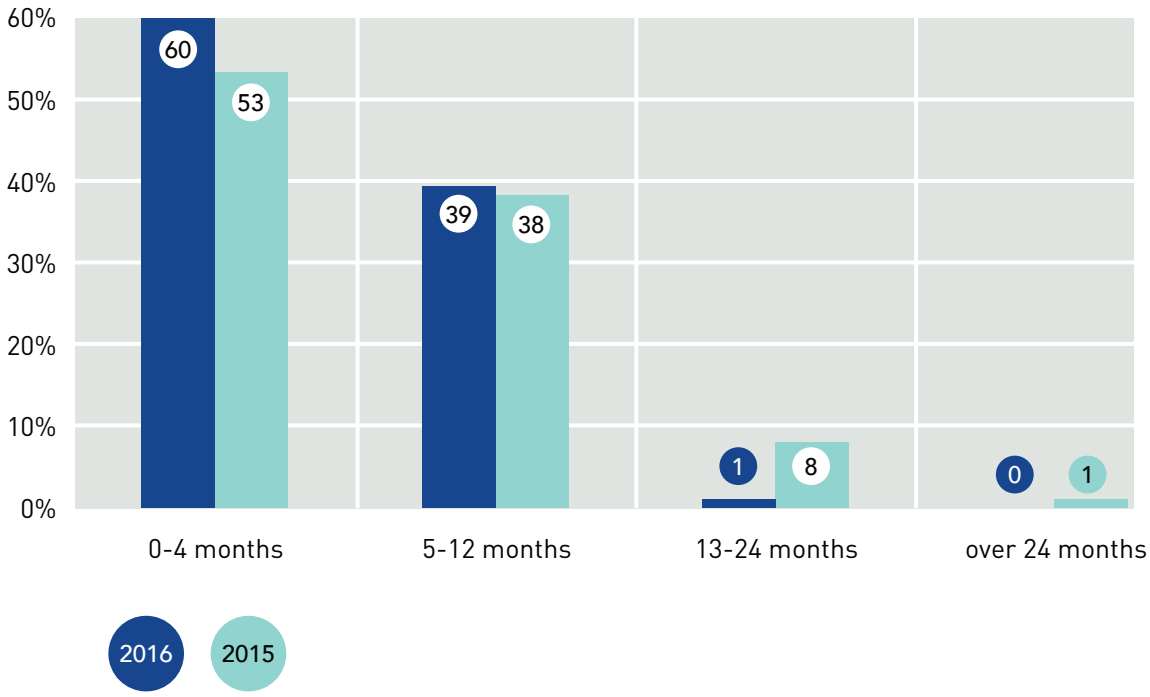



My Office reviewed 433 decisions of public bodies in 2016. This is 34% higher than the number reviewed in 2015.

## Settlements and withdrawals

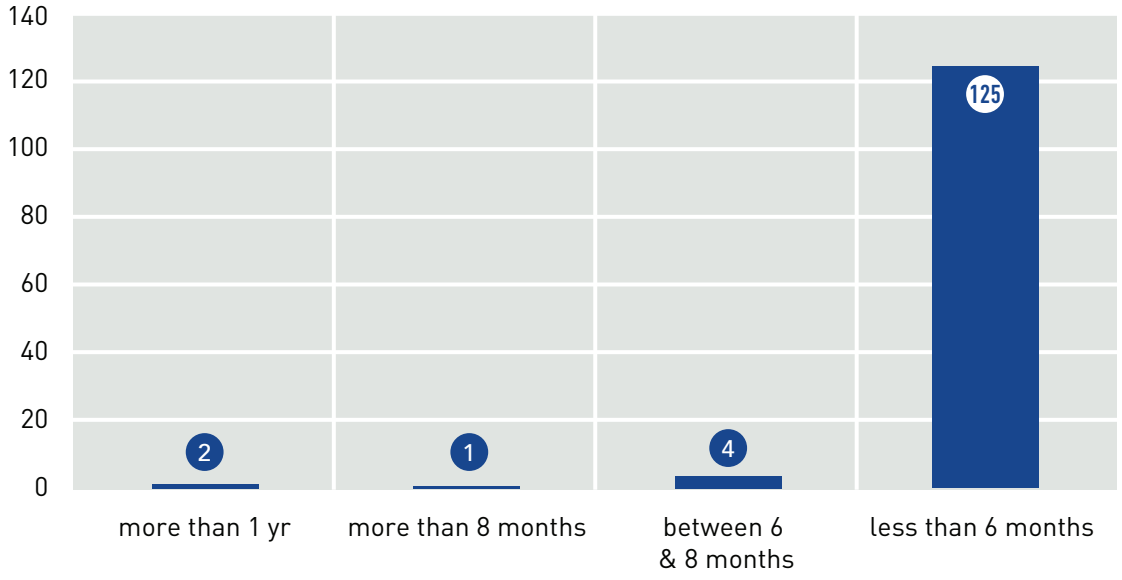
Settled and withdrawn applications often follow as a result of the intervention of my Office, where, for example, a more detailed explanation of a decision is given to the applicant by the public body, or additional records are released or part granted, and the review does not proceed to a formal decision.

## Age profile of cases closed by OIC




The table above shows how long it took my Office to complete reviews. I am very pleased to report another successful year which records a further increase in the number of cases closed within four months. 60% of all reviews closed in 2016 were closed within that time period. This is especially impressive given the 32% increase in applications accepted during the year.

## Age profile of cases on hand in OIC at end 2016



The age profile of open cases at the end of 2016 is quite similar to the position at the end of 2015. At the end of 2015 we had nine open cases over six months old, whereas that figure had fallen to seven by the end of 2016.

## Breakdown by public body of applications for review accepted by OIC

- 89 Health Service Executive
- 24 Department of Justice and Equality
- 11 Defence Forces
- 11 Irish Prison Service
- 9 St. James's Hospital
- 8 University College Cork
- 7 Department of the Environment Community and Local Government
- 6 University College Dublin
- 38 TUSLA: Child and Family Agency
- 18 RTÉ
- 11 Department of Social Protection
- 9 Department of Agriculture, Food and the Marine
- 8 Athlone Institute of Technology
- 7 An Garda Síochána
- 7 Dublin City Council
- 177 Other bodies with fewer than 5 applications each

## Breakdown of HSE cases accepted by OIC

- 26 HSE South
- 22 HSE West
- 18 HSE National
- 14 HSE Dublin North East
- 9 HSE Dublin Mid Leinster

## Deemed refusals

The FOI Act imposes statutory time limits on public bodies for processing an FOI request. Specifically, a decision on an original request should issue to the requester within four weeks and a decision on a request for an internal review should issue within three weeks.

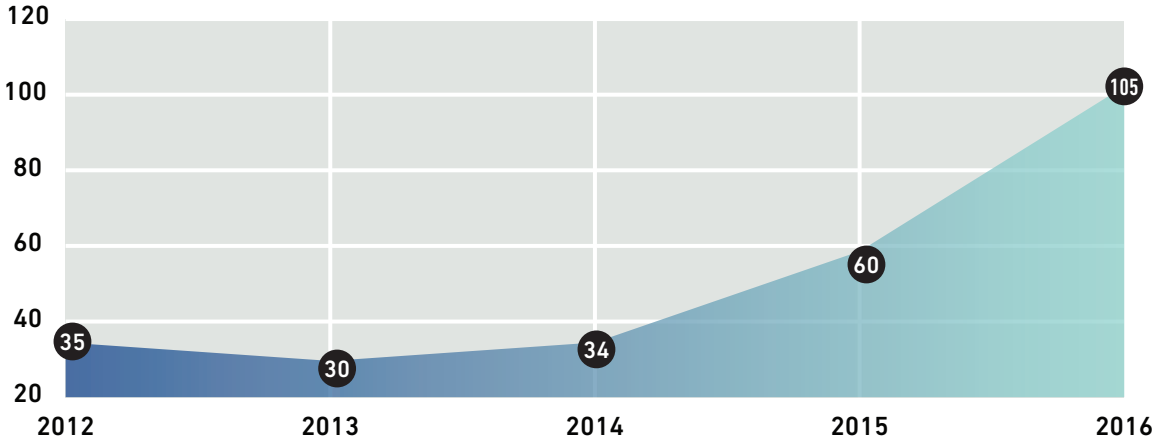
Where no decision is issued, either at the original request (first stage), or internal review (second stage), or a decision is issued late, the requester has the right to regard that decision by the public body as a 'deemed refusal' of access. Following a deemed refusal at the internal review stage, a requester is entitled to apply to my Office for a review.

**24%** of reviews were deemed refused by public bodies at both stages of the FOI request

The charts below show how many requests were deemed refused in the year at each stage of the request, and where both stages were deemed refused. This year is quite simply the worst year on record in terms of the number of deemed refusals by public bodies recorded by my Office. This is further clear evidence that public bodies are not providing adequate resources for processing requests.

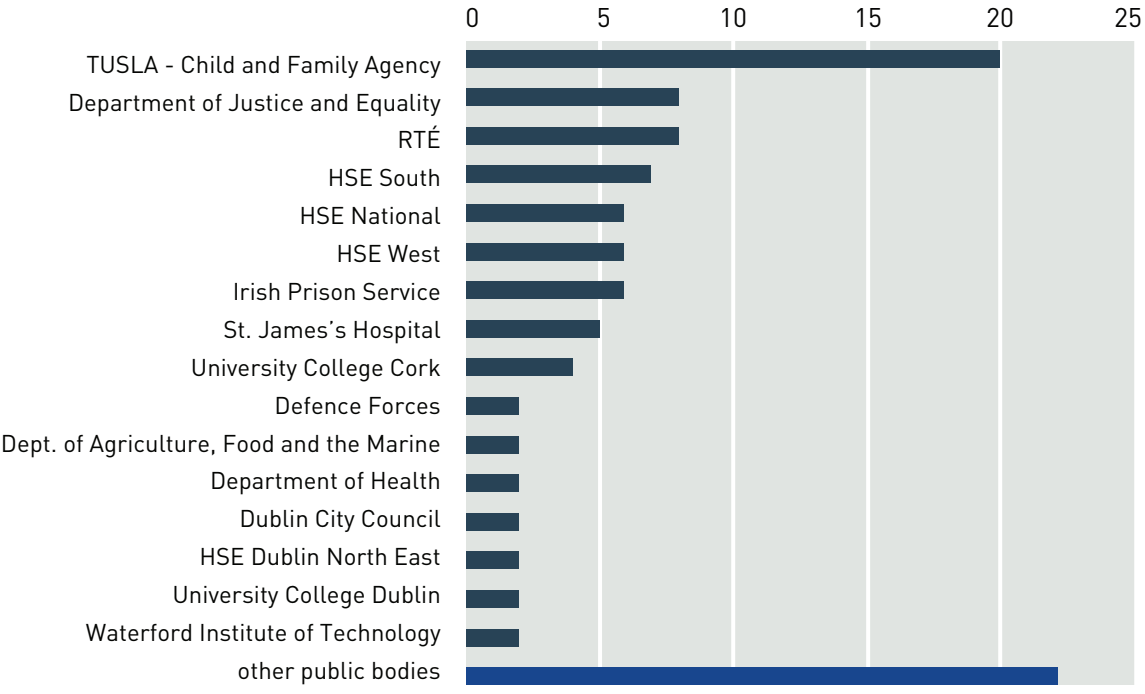
As can be seen from the charts, the worst offender for 2016 was TUSLA. My staff met with representatives of TUSLA during the year to discuss matters of concern, following which we wrote to TUSLA's quality assurance manager in connection with its overall management and processing of requests. At the time of writing, we have had no substantive response from TUSLA on these matters. My staff will be following up with TUSLA to seek tangible improvements in its processing of requests.

## Deemed refusals at both stages 2012 - 2016



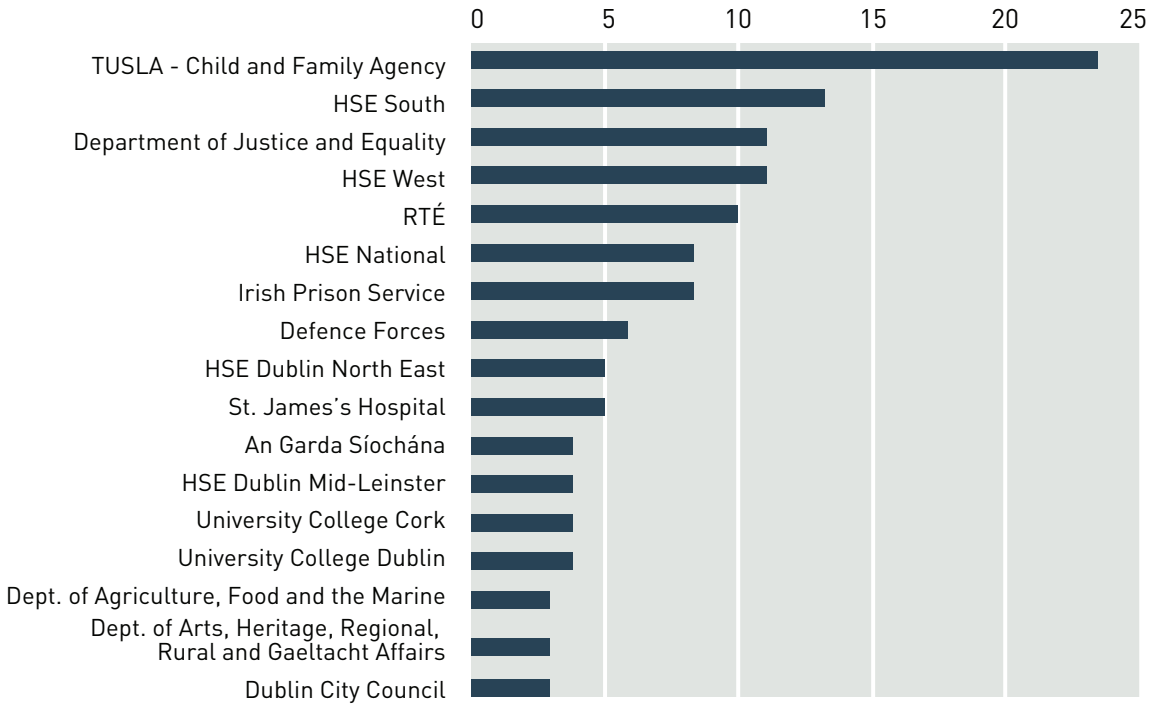

In 2016, 105 (24%) of all applications accepted by my Office were recorded as deemed refused at both stages of the FOI request.

## Deemed refusal at both stages by public body - 2016



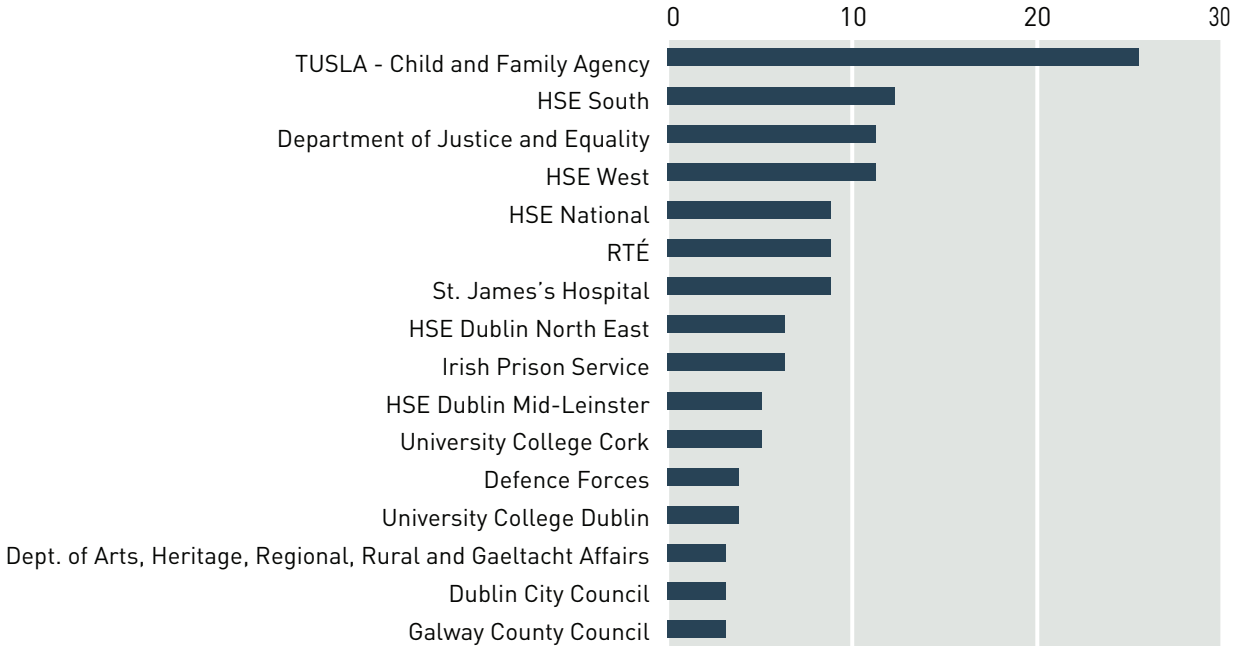
# **40%** of OIC reviews were deemed refused by public bodies at either the first or second stage of the FOI request

**Public body - deemed refusal at 1st stage of FOI request**



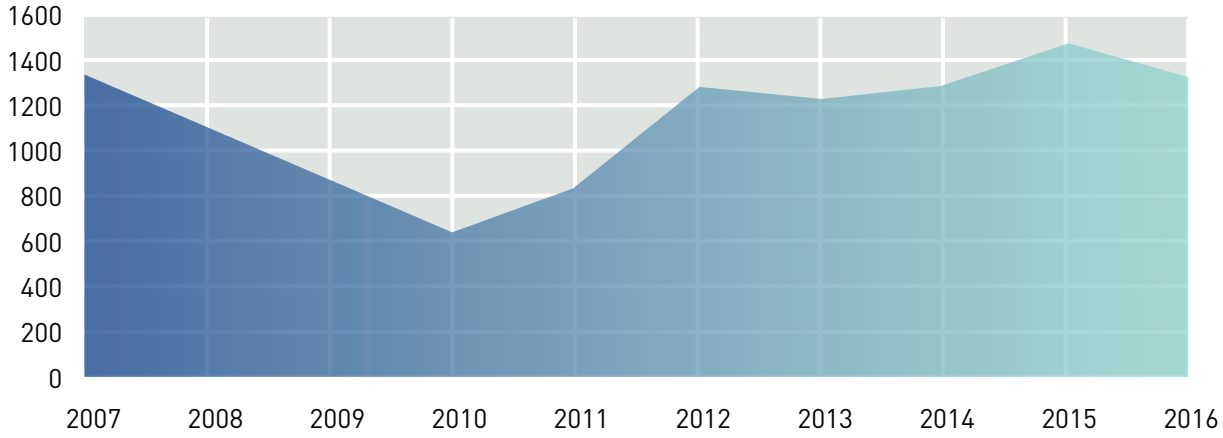

- An additional 49 requests were deemed refused at the original decision stage by 41 other bodies, each of which had fewer than 3 refusals.
- The total number of applications deemed refused by the public body at the original decision stage of the FOI request is 175, or 40% of reviews accepted by my Office.

## Public body - deemed refusal at 2nd stage of FOI request




- An additional 48 requests were deemed refused at the internal review stage by 38 other bodies, each of which had fewer than 3 refusals.
- Similar to the first stage, 174 (40%) of reviews accepted by my Office were deemed refused by a public body at the internal review stage.

## General enquiries to OIC




General enquiries concern various forms of communication, mostly from members of the public. The nature of those enquiries range from questions on the practicalities of the FOI Act to straightforward information about what to do next, or which public body might be able to assist.

## Fees received by OIC

During 2016, my Office received 272 applications for review where a fee was paid, an increase of 94 cases over 2015. The increase is due to the increase in requests for access to non-personal information. See table 17 in chapter 4.

The total amount of fees received in 2016 was €12,150.

A total of €5,910 was refunded to applicants for the following reasons:

- applications were either withdrawn, settled, or discontinued;
- applications were rejected as invalid, or a fee was not due;
- the public body had not issued an internal review decision within the time limit (section 19 of the FOI Act refers).

# Statutory Certificates issued by Ministers

## Section 34 of the FOI Act

Where a Minister of the Government is satisfied that a record is an exempt record, either by virtue of section 32 (Law enforcement and public safety), or section 33 (Security, defence and international relations) and the record is of sufficient sensitivity or seriousness to justify his or her doing so, that Minister may declare the record to be exempt from the application of the FOI Act by issuing a certificate under section 34(1) of the Act.

Each year, Ministers must provide my Office with a report on the number of certificates issued and the provisions of section 32 or section 33 of the FOI Act that applied to the exempt record(s). I must append a copy of any such report to my Annual Report for the year in question.

Section 34(13) of the FOI Act provides that

> *"Subject to subsections (9) and (10), a certificate shall remain in force for a period of 2 years after the date on which it is signed by the Minister of the Government concerned and shall then expire, but a Minister of the Government may, at any time, issue a certificate under this section in respect of a record in relation to which a certificate had previously been issued ..."*

My Office has been notified of the following certificates renewed or issued under Section 34 in 2016.

- Four certificates were renewed and two new certificates were issued by the Minister for Justice and Equality.
- Three certificates were issued by the Minister for Foreign Affairs and Trade.
- All the certificates referred to above will fall for review in 2018.

A copy of each notification is attached at Appendix I to this Report.

## Review under section 34(7)

I was notified by letter dated 9 December 2016 that pursuant to section 34(7) of the FOI Act, the Taoiseach, the Minister for Public Expenditure and Reform and the Minister for Jobs, Enterprise and Innovation carried out a review of the operation of subsection 34(1) of the Act.

The letter concluded that the Taoiseach, the Minister for Public Expenditure and Reform and the Minister for Jobs, Enterprise and Innovation are satisfied that it is not necessary to request revocation of any of the 13 certificates reviewed.

A copy of the notification is attached at Appendix II to this Report.

## Acknowledgment

I want to acknowledge the support of my Senior Investigators, Elizabeth Dolan and Stephen Rafferty, during 2016. I want to thank them and all the staff of the Offices of the Information Commissioner and the Commissioner for Environmental Information for their tremendous efforts in dealing with the significant challenges arising from the increased demands for our services while continuing to significantly improve case turnaround times. My thanks also to Diarmuid Goulding and Edmund McDaid for their assistance in compiling this Report.

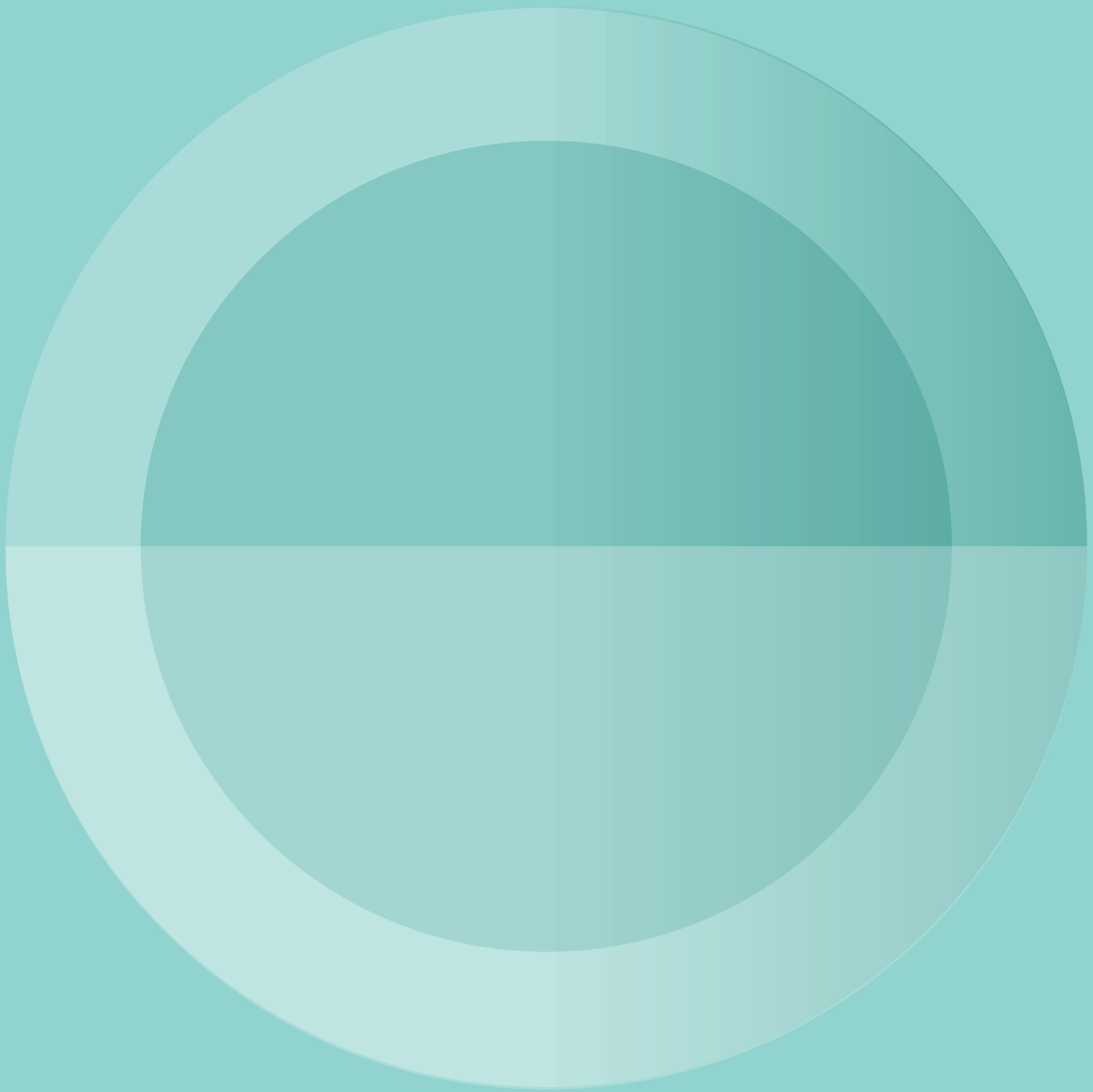
As reported in this and in previous Reports, the Office is continuing to develop and grow. Consequently, I am grateful for the support of the Information Communications Technology, Corporate Services, and Quality, Stakeholder Engagement and Communications Units, who provide essential shared services for the continuing developmental requirements of the Office.

Finally, I want to thank the Director General of the Office, Jacqui McCrum, for her commitment and support throughout the year. The Office has unquestionably benefitted from Jacqui's extensive experience and energy during the first full year in her role.

**Jacqui McCrum**
**Director General**

Chapter 2:

# Issues Arising



# Chapter 2: Issues Arising

This Chapter highlights issues which arose during the year concerning the operation of the FOI Act. Some issues relate to particular public bodies, while others are commentaries on how the new Act gave rise to issues not previously addressed.

Issues reported on are:

- Schedule 1 bodies
- Section 6(7) Dispute resolution
- First use of section 22(9)(a)(vii)
- First consideration of use of powers under section 45(8)
- Bodies challenging decisions on procedural grounds
- Appeals to the Courts
- Re-use of public sector information

I have also set out a brief summary of court activity during the year. Finally, I have included a brief commentary on my role as Appeal Commissioner under the European Communities (Re-use of Public Sector Information) (Amendment) Regulations 2015 (S.I. No. 525 of 2015).

## Schedule 1 bodies

In my Annual Report for 2015, I addressed the issue of the interpretation that had been adopted by the Central Bank of Ireland (the Central Bank) of the scope of its exclusion from the remit of the Act. The Central Bank is a partially included agency under the FOI Act 2014.

The vast majority of relevant bodies are deemed to be public bodies for the purposes of the Act by virtue of their inclusion in the categories set out in section 6 of the Act. However, Part 1(b) of Schedule 1 of the Act states that section 6 does not include a reference to the Central Bank insofar as it relates to certain records.

The issue relating to the Central Bank arose in the context of a request made by Mr. Colin Coyle of The Sunday Times for access to a copy of all minutes of the Central Bank Commission for a period spanning from 2014 to the date of the request in 2015. The Central Bank had taken the position that, as it was not a public body with respect to records containing information described in Schedule 1, Part 1(b)(i), the Act, including the internal and external review provisions, did not apply to all but one of the records requested, even where the records concerned also contained information that would otherwise be subject to the provisions of the Act.

In my decision, I noted that the position taken by the Central Bank was entirely at odds with the spirit and intent of the legislation and that adopting its position would lead to absurd consequences that could not have been intended by the Oireachtas in the passing of the Act. I also noted that my contrary view of the matter was supported by CPU Guidance Note 23 and the principles set out at section 11(3) of the Act. I found that I had the jurisdiction to review the Central Bank's effective decision to refuse the applicant's request for the records concerned on the basis that Schedule 1, Part 1 applies. I also found that a record falls within the scope of Schedule 1, Part 1(b)(i) only insofar as it contains the information specified as excluded from the scope of the Act and that the parts of the record that do not contain Schedule 1, Part 1(b)(i) information fall to be considered for release in accordance with the provisions of the FOI Act. I annulled the Central Bank's effective decision and directed it to undertake a fresh decision-making process in respect of the records concerned.

I am pleased to report that the Central Bank accepted my decision, albeit on a "without prejudice basis", and agreed to process the applicant's request under the provisions of the FOI Act. Redacted versions of the relevant minutes were subsequently released to The Sunday Times and have been published on the Central Bank's website.

During the year it was brought to my attention that the Central Bank was not alone in its interpretation of the scope of its inclusion or exclusion from the remit of the Act by virtue of its inclusion as a partially included agency in Schedule 1 and that other bodies had raised similar issues.

While I am satisfied that my understanding of my jurisdiction to review decisions of Schedule 1 bodies is correct and is supported by CPU Guidance Note 23, it would be a cause for concern for me if my Office was to continue to face similar jurisdictional challenges. It seems to me that a straightforward legislative amendment would put the matter beyond doubt. I intend to raise this matter with the Central Policy Unit during the year.

## Section 6(7) Dispute resolution

As I have outlined above, the vast majority of relevant bodies are deemed to be public bodies for the purposes of the Act by virtue of their inclusion in the categories set out in section 6 of the Act. Where a dispute arises between my Office and any entity as to whether it is a public body for the purposes of the Act, the dispute must be submitted to the Minister for Public Expenditure and Reform for a binding determination, in accordance with section 6(7) of the Act.

Early in 2016, the Central Policy Unit published a Dispute Resolution Policy and Procedure for processing such referrals to the Minister. The policy also provided for binding determinations where a dispute arises between an entity and a requester as to whether or not an entity is a public body.

During the year, my Office dealt with two cases where we found that the entity concerned was not a public body for the purposes of the FOI Act. The entities in question were the Property Arbitrator and the Dublin Returning Officer. In both cases, we informed the requesters of their right to seek a binding determination from the Minister in accordance with the published Dispute Resolution Policy.

However, following receipt of advice from the Office of the Attorney General, the Central Policy Unit notified my Office that the Minister was not in a position to make a binding determination on the matter as section 6(7) does not provide for such determinations in cases where the dispute is between the entity and a third party. It subsequently published an amended policy to properly reflect the provisions of section 6(7).

This leaves my Office in a position of having to make determinations on whether or not certain entities are public bodies for the purposes of the FOI Act, with no right of appeal except, perhaps, through the Courts. I intend to raise this matter again with the Central Policy Unit.

For the record, the Minister made determinations in two cases in 2016. He determined that the Bar Council (The General Council of the Bar of Ireland) and The Law Society of Ireland are not public bodies for the purposes of the Act.

## First use of section 22(9)(a)(vii)

Section 22(9) of the FOI Act provides for certain circumstances where I may use my discretion to refuse to accept an application for review or to discontinue a review. The FOI Act 2014 extended those circumstances to include cases where I consider that accepting the application would cause a substantial and unreasonable interference with, or disruption of, work of my Office.

I exercised that power for the first time in 2016 in Case No. 150430 (Messrs Z v NAMA). The requesters sought nine categories of records, all concerning their relationship with NAMA. The withheld records comprised more than 3,400 pages of information. While the volume of withheld information was a key factor, other relevant factors included the nature of the information concerned, the number of exemptions claimed by NAMA, the need to establish the identity and status of the parties to the records and the likely need to notify and invite submissions from potentially affected third parties.

I concluded that the examination that would be required of such a number of records, having regard to the number of records involved and the nature of the information concerned, was such that processing the review would cause a substantial and unreasonable interference with, or disruption of, work of my Office. While the applicants were invited to refine the scope of the review, they did not do so. Therefore, I discontinued my review.

## First consideration of use of powers under section 45(8)

The 2014 Act extended my powers, for the first time, to follow up on cases where public bodies fail to comply with my binding decisions. Under section 45(8), I may apply to the court for an order to oblige the public body to comply with my decision.

I came very close to seeking such an order in 2016. On 17 August 2016, I issued a decision in Case No. 160196, directing An Garda Síochána (AGS) to release certain information to a journalist in response to his FOI request (See Chapter 3 for more details on the case).

Under section 24, a party to a review may appeal to the High Court on a point of law arising from my decision. However, where no such appeal is made, my decisions are binding on the parties concerned. The circumstances of this case were such that AGS had four weeks within which to make such an appeal. By letter dated 15 September 2016, I was informed by AGS of its intention to appeal my decision. However, no such appeal was made.

A number of further exchanges of correspondence between my Office and AGS followed. However, it was only on the threat of court action, some 11 weeks after my decision, that my Office secured the release of the information at issue.

While I am obviously very pleased that I did not have to seek a court order to oblige compliance, I was disappointed that it took so long for the requester to receive the information in question. I fully accept that public bodies are entitled to carefully consider my decisions and to appeal decisions to the High Court where they consider it appropriate to do so. However, where an appeal is not made, I expect bodies to act upon my decisions without further delay.

## Bodies challenging decisions on procedural grounds

On the subject of bodies challenging my decisions through the courts, I noted a matter of particular concern during the year that I hope will not become a regular feature of court appeals.

As I have mentioned above, under section 24 of the Act, a party to a review may appeal to the High Court on a point of law arising from my decision. In two such appeals that were made by public bodies during 2016, the public bodies did not confine themselves to identifying what I would regard as pure points of law on the application and interpretation of the FOI Act as their grounds for appeal. Instead, they also chose to challenge the procedural grounds on which the review was conducted.

While I fully accept that the bodies concerned were entitled to raise procedural concerns, I would question what they were hoping to achieve by doing so. In both cases, the public body raised concerns about the procedures my Office adopted in the course of the review, notwithstanding the fact that those procedures have been in operation since June 2014 and that the details of the procedures are publicly available on our website. It is also noteworthy that all bodies, including the two bodies concerned, received advance notification of our intention to adopt the procedures in question, as far back as April 2014.

It seems to me that were the Court to find that the procedures my Office adopts in conducting reviews are somehow unfair, the most likely outcome would be for the Court to direct my Office to examine the matter again. The substantive issue would most likely remain unresolved.

If any public body has a particular concern about my Office's procedures for conducting reviews, I would sincerely hope that it would raise such concerns directly with my Office outside of the Court process. While I believe that our procedures are, indeed, fair, I would be more than happy to consider any related concerns with the public bodies.

# Appeals to the Courts

A party to a review, or any other person who is affected by a decision of my Office, may appeal to the High Court on a point of law. A decision of the High Court can be appealed to the Court of Appeal/Supreme Court.

Three appeals of decisions of my Office were made to the High Court in 2016. Two decisions were appealed by the applicant and one by the relevant public body. All appeals are listed for hearing or mention in 2017.

Two written High Court judgments were delivered in 2016, both of which are summarised below. An ex tempore judgment of the Court of Appeal is also summarised in this section.

## F.P. v The Information Commissioner [2014 No. 114 MCA]

### Background and issue

In December 2016, the High Court delivered its judgment in the case of F.P. v The Information Commissioner [2014 No. 114 MCA]. The question presented by the case was whether under section 28(5)(a) of the FOI Act 1997, the public interest in granting the applicant's requests for access to records relating to himself and his former step-daughter outweighed the public interest in protecting the privacy rights of the individuals (apart from the applicant) to whom the information related. In my decision in Case 090261/62/63, which I reported on in my Annual Report for 2014, I concluded that the answer was no, notwithstanding evidence of malicious allegations of child sexual abuse having been made against the applicant. I found that, regardless of the evidence of malice, the records concerned deeply troubled family circumstances. Having regard to the judgment of the Supreme Court in the Rotunda Hospital case, the views of the applicant's former step-daughter (who was then aged 20) and her mother, and the records that had already been released to the applicant, I determined that, on balance, the public interest in granting the applicant's requests for access to the records at issue was not sufficiently strong to outweigh the public interest in upholding the privacy rights of the third parties concerned. The applicant's appeal to the High Court was not allowed.

### Conclusions of the Court

The Court was not satisfied that the issue of malice, as raised by the applicant, was central to, or determinative of, the issue of access to records. The Court found that I was correct in my view that, even if the allegations were made for what may be regarded as malicious purposes, the records at issue related to deeply troubled family circumstances. However, the Court also found that, as I had acknowledged, the context in which the allegations were made was relevant to the strong public interest in openness and accountability in relation to the manner in which public bodies carry out their functions in dealing with allegations of child sexual abuse.

The Court confirmed that the applicant's purpose for seeking the records was not relevant and that his interests in accessing the records in order to determine whether he had a cause of action against any of the parties, or to advance such a claim, or to provide the basis for making a criminal complaint or to mount a judicial review against the public bodies, did not qualify as matters of public interest. The Court was satisfied that these interests were in reality matters of "private interest". The Court was also satisfied that it would require a legislative change to permit the right of access to records as a matter of course to persons claiming to be falsely accused of child sexual abuse or any other crime.

The Court also confirmed that the appropriate forum for pursuing a cause of action arising from false allegations or for challenging the actions of public bodies is provided for by the courts, where extensive legal remedies and fair procedures for discovery and disclosure are available in civil and criminal proceedings. Thus, the Court observed that the question of whether the public bodies acted in accordance with fair procedures may be the subject of judicial review. The Court was not satisfied that the applicant could use the process of appeal under FOI "to mount something akin to a collateral attack on the investigations and determinations" made by the public bodies in relation to the allegations made against him. Likewise, the motivation for, or validity or truthfulness of, any allegation, is a matter to be pursued by other forms of remedy.

The Court was satisfied that I had carefully distinguished between the applicant's assertion of private rights and the general public interest in openness and transparency in respect of information held by public bodies. The Court was also satisfied that I had given appropriate weight to the strong public interest in openness and accountability in relation to the manner in which public bodies carry out their functions in dealing with allegations of child sexual abuse. In the circumstances, and in light of the public interest served by the records that had been released to the applicant, it was open to me to consider that the important public interest concerning good governance was outweighed by the public interest in upholding the rights to privacy of the mother and child concerned.

Note: The applicant has since appealed the Court's decision to the Court of Appeal.

## Patrick McKillen and the Information Commissioner [2015 No. 4 MCA]

### Background and issue

The applicant applied to my Office for a review of a decision of the Department of Finance to refuse access to certain records relating to him or to his personal or business loans.

My Office found that parts of some of the refused records should be withheld on the grounds that they contained commercially sensitive information relating to third parties (section 27) and the public interest did not justify release of the information. During the course of the review, it emerged that the applicant had sought and been granted an order for discovery in the Courts against parties, including the Department, and that the Department had provided

the applicant with some of the records pursuant to the order for discovery. My Office found that access to those records must be refused, as to do otherwise would constitute contempt of court (section 22).

### Conclusions of the Court

The judgment of Noonan J. was given on 19 January 2016 in favour of my Office. The Court upheld my Office's findings with regard to section 27. It found that as the appellant had not argued before my Office that section 27(1)(b) did not apply, he could not, therefore, advance the argument before the Court.

The appellant argued that the public interest lay in exposing what he claimed was unfair dealing by the Department which could be harmful to the State's interest. However, the Court found that any improper conduct, if there was such, was disclosed by the information released.

The judge also found that he was bound to follow the judgment of O'Neill J. in EH and EPH v. the Information Commissioner [2001] 2 I.R. 463 with regard to breach of the implied undertaking given in respect of discovered documents being a contempt of court. Disclosure of documents the subject of an order for discovery whenever made, is a contempt of court. Section 22(1)(b) is mandatory and in such circumstances, disclosure must be refused.

Note: The applicant has since appealed the Court's decision to the Court of Appeal.

## X and the Information Commissioner [2015 No. 439 MCA]

### Background and issue

In this case, my Office had affirmed a decision of the Department of Defence to release certain records with the applicant's name and address redacted (Case No. 130175 - Mr X and the Department of Defence). The applicant appealed that decision to the High Court. While the grounds of appeal were not entirely clear, it appeared that the applicant's main concern was that the release of the redacted records would still result in the disclosure of his identity. At an early stage in the proceedings, it transpired that the Department had not provided my staff with a full set of records. Therefore, my Office did not oppose the appeal and informed the High Court that it was willing to have the matter remitted for a fresh review. On 13 July 2015 the High Court directed that the matter be remitted to my Office to be dealt with in accordance with the law. The applicant subsequently appealed the High Court's decision to the Court of Appeal. The main remedy he sought was for the original FOI request to the Department of Defence to be struck out.

### Conclusions of the Court

In October 2016, the President of the Court of Appeal delivered an oral judgment in the case. The Court of Appeal found that under FOI legislation, the original requester was entitled to have his FOI request processed. The Court noted that while Mr X's desire to have the FOI

request struck out was understandable, the FOI request nevertheless remained and there was a statutory mechanism in place to deal with it. In the circumstances, the Court of Appeal held that there was no basis for it to do anything other than affirm the High Court decision and allow a remittal to my Office.

# Re-use of public sector information

## European Communities (Re-use of Public Sector Information) Regulations 2005

Public sector bodies create, collect, and publish information in the course of their public functions. Directive 2003/98/EC on the re-use of public sector information establishes a minimum set of rules governing the re-use of existing documents held by public sector bodies. Directive 2013/37/EU amends and expands the scope of the earlier Directive. These Directives are transposed into Irish law by the European Communities (Re-use of Public Sector Information) Regulations 2005 (the PSI Regulations), as amended by the European Communities (Re-use of Public Sector Information) (Amendment) Regulations 2015.

Re-use, in relation to a document held by a public sector body, means the use by an individual or legal entity of the document for commercial or non-commercial purposes other than the initial purpose within the public task for which the document was produced. The regulations apply to physical and electronic documents.

Under the PSI Regulations, an individual or a legal entity may make a request in a legible form to a public sector body to release documents for re-use. Every request must indicate that it is being made for the purpose of the re-use of public sector information. The Regulations provide that, on receipt of a request in respect of a document held by it to which the PSI Regulations apply, a public sector body must allow the re-use of the document in accordance with the conditions and time limits provided for by the Regulations.

Where possible and appropriate, documents made available for re-use must be provided in open and machine-readable format. Machine-readable information is information which can be easily interpreted and processed by different software applications.

As Information Commissioner, I am the designated Appeal Commissioner for the purposes of the PSI Regulations. Under Regulation 10 of the PSI Regulations, decisions of public sector bodies can be appealed to my Office, including decisions on fees and conditions imposed on re-use.

In 2016, three appeals were made to my Office under the PSI Regulations.

## Conor Ryan on behalf of RTÉ and the Standards in Public Office Commission - RPSI/16/01

In the first such appeal to my Office, a journalist appealed a decision of the Standards in Public Office Commission not to release for reuse a machine-readable version of the online Register of Lobbying. The Commission subsequently provided the journalist with access to a machine-readable version of the Register, and the appeal was withdrawn by the appellant.

## Vizlegal Limited and the Patents Office - RPSI/16/02

In this appeal, I reviewed a decision of the Patents Office to refuse to allow re-use of its databases in open and machine-readable format. As a preliminary point, I found that the appellant was not entitled to re-use unpublished documents by making a request under Regulation 5(1)(a) in circumstances where a right of access to such documents had not been established.

I found that the Patents Office was justified in refusing to release the patents database and the design database in open and machine readable format, as this would involve a disproportionate effort, going beyond a simple operation. Accordingly, there was no obligation on the Patents Office to adapt or to provide extracts from the databases to meet the appellant's request.

I found that the statutory fees for use of the computerised trade mark database did not conflict with the rules on charging for re-use under Regulation 6 of the PSI Regulations. In particular, I found that although the charges exceeded the marginal cost of reproduction, provision and dissemination of the database, the charges complied with Regulation 6(1A)(a)(ii), as the Patents Office was required to generate sufficient revenue to cover a substantial part of the costs relating to the collection, production, reproduction and dissemination of the database.

Accordingly, I affirmed the Patents Office's decision to refuse the appellant's request.

## Conor Ryan on behalf of RTÉ and the Companies Registration Office - RPSI/16/03

In this appeal, I reviewed a decision of the CRO to refuse a request to re-use a database of disqualified and restricted persons in open and machine-readable format.

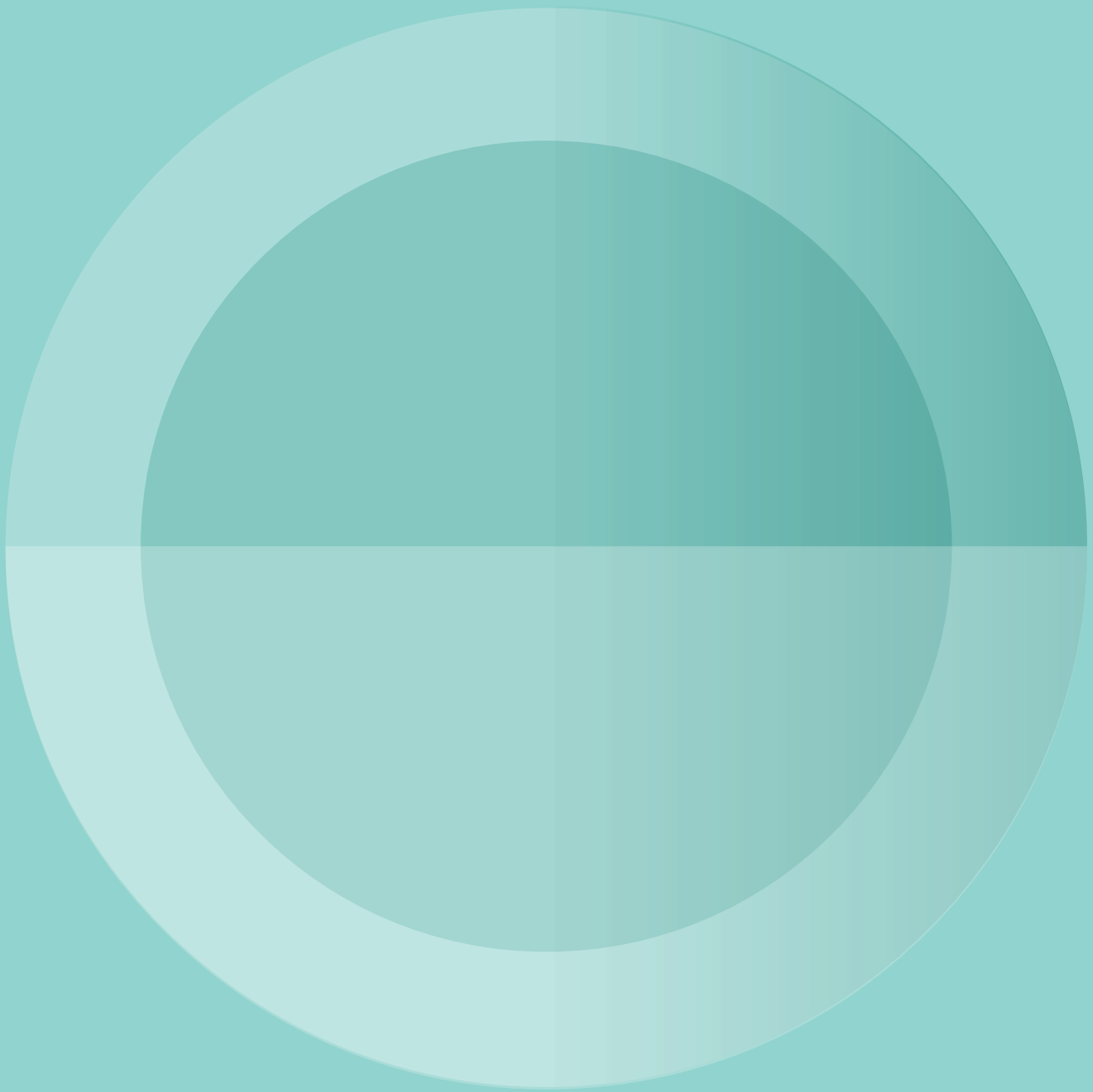
I found that the CRO was not justified in refusing the appellant's request on the basis that the information was publicly accessible, as this reason did not address the question of whether the database could be re-used. Notwithstanding this, I found that refusal of the appellant's request was otherwise justified on the basis that there was no obligation on the CRO to adapt

the database or to provide extracts from the database in circumstances where this would involve a disproportionate effort, going beyond a simple operation.

Accordingly, I affirmed the CRO's decision to refuse the appellant's request.

Chapter 3:

# Decisions



# Chapter 3: Decisions

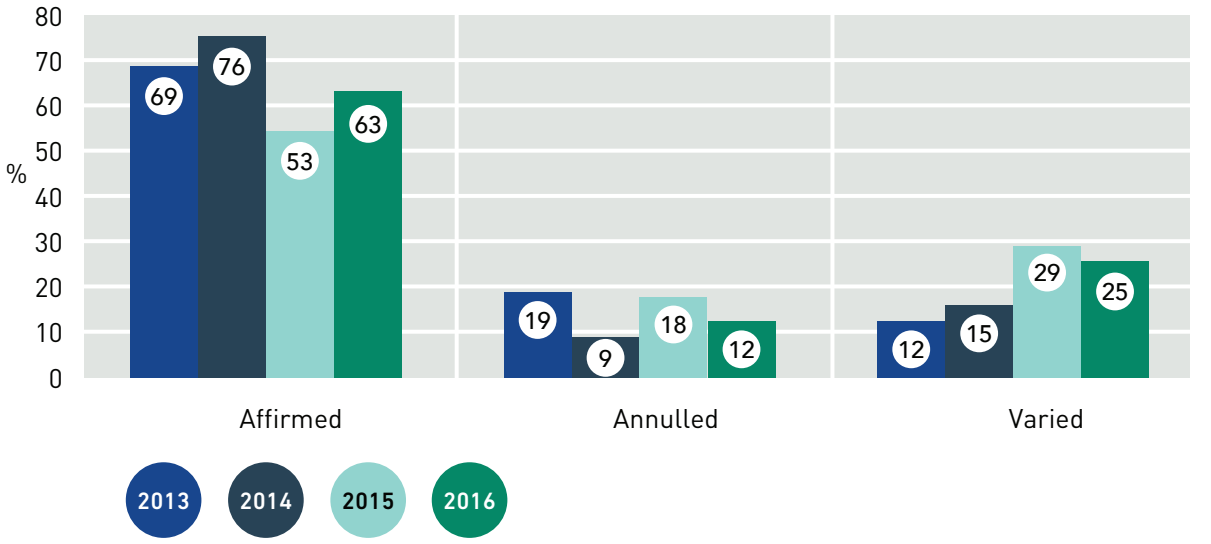
## Formal decisions

My Office reviewed 433 cases in 2016. A formal decision was issued in 285 of those cases, representing 66% of all reviews completed during the year. The remaining 148 reviewed cases were closed by way of discontinuance, settlement or withdrawal.

We completed **99%** of our reviews within twelve months

See Table 15, Chapter 4 for a comparison of all reviews closed in the year.

The table below provides a percentage comparison of the outcomes (affirmed, varied or annulled) of decisions on cases.




## Annulment of decisions to which section 38 applies

Section 38 provides for a statutory notification requirement that public bodies must observe in relation to the exemptions contained in section 35 (information obtained in confidence), section 36 (commercially sensitive information) and section 37 (personal information relating to a third party). In the case of each of these exemptions, the FOI body may grant a request if it considers that the public interest is better served by granting than by refusing the request. However, any proposal to release such otherwise exempt material is subject to the provisions of section 38. That section requires the FOI body to notify certain third parties that it proposes to grant the request in the public interest and that the FOI body will consider any submissions from the third parties before deciding whether to grant or refuse the request. It also provides for the processing of such requests within a specified timeframe.

My Office may annul decisions where timelines associated with the provisions of section 38 have not been adhered to by the body concerned. In 2015, I annulled ten such cases. I am pleased to report that just three such cases were annulled by my Office in 2016.

The section 38 notification process is complex and can place an onerous burden on decision makers. However, there are various sources of information available to assist public bodies in processing such requests. The Central Policy Unit has published a manual for FOI decision makers which contains guidance on the application of section 38, including some useful letter templates. It has also published a specific guidance note on the matter (CPU Notice No. 8 - Requests involving third parties - A step by step guide).

# Decisions of interest

The following cases represent a sample of cases my Office reviewed during the year that were concluded by way of a formal decision. The full text of all formal decisions issued during 2016 is available at www.oic.ie.

## Mr C and the Defence Forces - Case 150243

In this case, the applicant, a member of the Defence Forces, sought access to a military police report relating to a redress of wrongs complaint submitted by him. The Defence Forces refused access to the record under section 42(c)(ii)(II) of the FOI Act. That section provides that the Act does not apply to a record held by the Defence Forces relating to section 170 of the Defence Act 1954. Section 170 of the Defence Act states that "For the prompt suppression of all offences a provost marshal of commissioned rank may from time to time be appointed." The Defence Forces contended that section 42(c)(ii)(II) was intended to restrict the application of the FOI Act in relation to Defence Forces records held by the Provost Marshal appointed under section 170 of the Defence Act relating to his police function in respect of the suppression of offences.

Having regard to the plain and ordinary meaning of the language used, I concluded that the purpose of section 170 was to provide the statutory authority for the appointment of a provost marshal. Therefore, any records relating to the appointment of a provost marshal were excluded from the FOI Act by virtue of section 42(c)(ii)(II). However, I did not accept the Defence Forces' argument that records relating to the provost marshal's functions were also excluded on the basis that such records related to section 170. In my view, there was not a sufficiently substantial link between records "initiated under the direction and authority of the Provost Marshal for the purposes of the investigation of offences under military law", as described by the Defence Forces, and section 170 of the Defence Act, given that the purpose of that section was simply to provide the statutory authority for the appointment of a provost marshal.

Therefore, I found that section 42(c)(ii)(II) did not operate to restrict the application of the FOI Act to the record sought by the applicant. I annulled the Defence Forces' decision and directed it to conduct a fresh decision making process on the request.

## Siobhán Maguire of The Sunday Times and the Health Products Regulatory Authority - Case 160089

The applicant sought access to all 2015 inspection reports of premises using animals for scientific or educational purposes, together with certain related correspondences. The Health Products Regulatory Authority (HPRA) granted partial access to the records, and refused access to the remaining information under sections 29, 30(1)(a), 32(1)(b), 35(1)(a), 36(1)(b) and 37 of the FOI Act.

During the course of the investigation, my Office notified the 18 affected research establishments of the review and invited them to make submissions. Fifteen establishments replied, the majority of which objected to release of the relevant information.

Section 29 is an exemption that protects the deliberative processes of FOI bodies. In this instance, I did not accept that the HPRA was engaged in a deliberative process, but

rather found that it had issued certain correspondence in the exercise of its regulatory responsibilities. Therefore, I found that section 29 did not apply to the records. Section 30 is an exemption that protects the functions and negotiation of FOI bodies. As establishments involved in animal testing for scientific purposes are legally obliged to cooperate and engage with the HPRA, I did not accept the HPRA's argument that the release of the records could reasonably have been expected to prejudice or harm the effectiveness of future investigations of such establishments. Similarly, I found that the HPRA had not demonstrated that the release of the records would have been likely to prejudice the future supply of information from research establishments, and therefore I concluded that section 35(1)(a), which protects information given to a public body in confidence, did not apply.

Section 32(1)(b) is an exemption that protects records, the release of which could reasonably be expected to endanger the life or safety of any person. I noted that scientific research on animals is an issue that generates much controversy and on which many people hold strong opinions. While I accepted that the vast majority of opponents of animal research are entirely peaceful, I was satisfied that there may be a small minority who are willing to use violence against those involved in such research.

I accepted, therefore, that the disclosure of information revealing the location of the research institutions, and the identities of individuals involved in such research and engaged in inspections, could reasonably be expected to endanger the life or safety of such individuals. While I directed the release of the majority of the information contained in the inspection reports, this was subject to the redaction of certain information that could allow for the identification of the research establishments or the individuals either engaged in such research or in inspecting such establishments.

[Note: This decision has been appealed to the High Court by the HPRA.]

## Seán McCárthaigh of The Times and An Garda Síochána – Case 160196

In this case, the applicant sought access to a record of staffing levels of An Garda Síochána (AGS) at sub-district level as at 31 December 2015. AGS argued that the information sought was exempt under section 32(1)(a), a discretionary, harm-based exemption which applies where access to the record concerned could reasonably be expected to prejudice or impair certain aspects of law enforcement and public safety. AGS contended that the disclosure of the staffing levels at sub-district level would disclose detailed operational policing information which would allow for an assessment of the operational policing capabilities in any location at any given time, and that this would prejudice and impair the personal safety of Gardaí and their ability to employ methods to prevent criminal activity, and would put the local community at risk of being subjected to crime sprees.

While acknowledging that AGS has a special and unique expertise in relation to the enforcement of the law and the prevention of criminal activity, I found that its own internal review decision had demonstrated that the disclosure of the information sought would not,

in fact, allow for an accurate assessment of operational policing capabilities in any location at any given time. I also noted that similar information has been placed into the public domain in the past, including by the previous Minister for Justice and Equality in July 2013, and no argument had been made that the harms envisaged arose. I concluded that AGS had failed to demonstrate that it was justified in refusing access to the information sought by the applicant, and I directed its release to him.

## Mrs X and the Rotunda Hospital - Case 150389

The applicant made a request for any records held by the Rotunda Hospital in relation to her late son. Her son was born at home in 1960, attended by midwives from the Hospital. Sadly, he died later that day in the Hospital.

The Hospital found and released a small number of relevant records to the applicant. The applicant sought a review by this Office because she was not satisfied with the extent of the records found, and particularly because a paediatric chart could not be found.

The Hospital submitted that if the paediatric chart existed, it would be in external archives, in a particular box. It stated that when looking for an archived file, it normally asks the external archive company to check the box that would be expected to hold the file. If the company does not find the file, the Hospital normally then asks for the box concerned to be delivered to the Hospital, so that Hospital staff can re-examine it. The Hospital's submission said it had "called in" and "reviewed" all charts in the appropriate box but that the file was not found.

The Hospital agreed, at this Office's suggestion, to search two other particular boxes of archived paediatric charts, to rule out the possibility that it had been misfiled. However, the paediatric chart was subsequently found in the box in which it should have been. It seems that the Hospital gave the wrong box number to the archive company at the outset, and so the archive company checked the wrong box. Furthermore, the Hospital did not retrieve the box concerned from the archive company, and the internal reviewer failed to review the searches conducted for the paediatric file. Finally, the Hospital had prepared its submission to this Office based on an assumption that procedures for searching and retrieving boxes held in external archives had been complied with.

An Investigator from this Office met with the Hospital to discuss what had happened and to carry out spot checks of some other records that the Hospital's submission said were searched. I was satisfied, on foot of this meeting, that the paediatric file was not found at the outset because of a mistake that anyone could make. However, this was compounded by failures to follow procedures, and by assumptions being made.

The Hospital was very frank with this Office about why there was a delay in finding the chart. Its staff cooperated fully with this review. It apologised for the errors and assured this Office that it will review its procedures for searching for records and that, in particular, it will

comply with its own procedures for checking externally archived records. It has also said it will ensure that internal reviewers will examine all aspects of the appeal before them (which the Hospital says is normally the case). Accordingly, I do not expect similar issues to arise in future reviews. I should also say that, over the years, the Hospital has taken its obligations under the FOI Act very seriously, and I am satisfied it continues to do so. Furthermore, the Hospital seemed to have gone to great lengths to assist the applicant in this case.

Case completions increased by **34%** over 2015

## Mrs X and the Department of Justice and Equality - Case 160157

In this case, the Department failed to meet the deadlines for issuing both the original and internal review decisions. Furthermore, my decision on this case, which issued on 25 July 2016, directed the Department to release certain records. Section 24(4)(b)(ii) of the FOI Act requires a public body to release records within four weeks of such a decision (unless an appeal to the High Court is made, which was not the case here).

However, the applicant contacted my Office in September to say that she had not received any records. Further to contacts from this Office, the Department released the records on 6 October 2016. The Department, and all FOI bodies, should bear in mind that section 45(8) of the FOI Act gives me the power to apply for a court order to require compliance with a binding decision from this Office.

## Mr Y and the Central Statistics Office - Case 150292

The Central Statistics Office (CSO) refused the applicant's request for access to information about him contained in the 2006 and 2011 Census of Population forms. It based its refusal on a provision of the Statistics Act 1993. Under section 41(1)(b) of the FOI Act 2014, a public body must refuse a request if the non-disclosure of the record is authorised by any enactment other than a provision specified in Schedule 3 of the Act and the case is one in which the body would refuse to disclose the record pursuant to that enactment.

The CSO primarily relied on sections 32 and 33 of the Statistics Act which provide for restrictions on the use of information gathered for statistical purpose and a prohibition on the disclosure of such information.

The CSO argued that statistical confidentiality is a core value of official statistics and that the quality of official statistics depends on public trust that statistical information returned by individuals and businesses will be treated as strictly confidential and used only for statistical purposes. It claimed that the only section of the Statistics Act explicitly providing for disclosure is section 35, which provides for access to the Census of Population after 100 years and that it is the policy of the CSO that census records are not released in advance of this 100 year period.

I fully appreciate the CSO's concern to ensure the confidentiality of statistical information provided by individuals and businesses. However, the question before me was whether the CSO was justified in its decision to refuse access to the information sought by the applicant under section 41(1)(b) of the FOI Act on the ground that the non-disclosure of the records is authorised by the Statistics Act 1993.

I accepted that section 33(1) of the Statistics Act generally prohibits the disclosure of information obtained under the Act that can be related to an identifiable individual or undertaking. However, I noted that the prohibition on disclosure is not absolute. The section provides that no information that can be related to an identifiable individual or undertaking shall, except with the written consent of that person or undertaking or the personal representative or next-of-kin of a deceased person, be disseminated, shown or communicated to any person or body.

I took the view that it is implicit in the wording of the section that the general prohibition on disclosure of information that can be related to an identifiable individual or undertaking does not apply where the identifiable individual or undertaking or the personal representative or next-of-kin of the individual, if deceased, has given written consent for its disclosure.

Accordingly, I found that section 41(1)(b) of the FOI Act does not apply in the circumstances of the case as the prohibition on disclosure in the Statistics Act is not absolute and does not authorise the CSO to refuse to disclose to an individual information relating to that same individual. I annulled the CSO's decision and directed it to undertake a fresh decision making process on the request.

## Mr X and the Department of Transport, Tourism and Sport - Case 160187

The background to this case is the crash of an Aer Lingus Viscount plane (St. Phelim) in 1968 near Tuskar Rock, Co. Wexford, in which 61 passengers and crew lost their lives. The applicant sought access to the witness statements taken during investigations into this matter. However, many of the witness statements predated FOI legislation. If requesters seek access to "pre-commencement records" which do not relate to personal information about them, they must show that access is necessary or expedient in order to understand later records. On reviewing the records, my Office decided that the later witness statements could be understood independently of, and without reference to, the older ones and that

there was no right of access to the older ones. My Office went on to decide that the later witness statements were exempt from release, as the information which they contained was either confidential or personal information.

## Dara Bradley, Connacht Tribune Group and Galway City Council - Case 160047

The Connacht Tribune asked the Council for the names of hotels/B&Bs providing emergency accommodation to homeless people and the amounts being paid to them. The Council released details of its total expenditure on the hotels/B&Bs for the period concerned but refused to give the hotels/B&Bs' names or the individual amounts payable to them.

In its submissions to my Office the Council emphasised the very serious challenges which it faces in providing emergency accommodation for homeless people. In my decision, I emphasised that I did not underestimate the gravity of the housing situation, but that I had to consider the matter within the framework of the FOI Act.

In that respect, I did not accept that releasing the information concerned could have a serious, adverse effect on the Council's functions. This was not least because none of the hotels/B&Bs had told my Office they would stop doing business with the Council if the information were released, despite having been invited to make submissions. Moreover, although I recognised the possibility that releasing the information could prejudice the hotels/B&Bs' competitive positions, I believed that the public interest required the disclosure of this information. In my view, real transparency about achieving value for money required access not only to the total expenditure, but also the number and identities of the hotels/B&Bs concerned and the amounts being paid to each of them.

## Mr X and Limerick City and County Council - Case 150322

The applicant sought Council records about the maintenance of a street on which she had fallen. The Council believed that she was looking for this information in order to bring a personal injury claim against the Council. Its correspondence indicated that it did not believe that the applicant should be allowed to access records under FOI which could relate to future litigation. However, my Office's decision emphasised that the applicant's motive was not relevant to whether she was entitled to the records under FOI. It referred to a finding of my predecessor in Case 020179 ('Organisation A and the Department of Arts, Sport and Tourism'): "I am aware of no restrictions on the use of the FOI Act as a means of obtaining documents held by a public body which might otherwise be available through the process of discovery". In the circumstances, my Office found that the Council had not justified its position that releasing the records could prejudice future legal proceedings or negotiations.

## Ms X and the Health Service Executive - Case 160190

This case concerned information about applications for temporary appointments in the HSE. Given the nature of the information, it should have been a fairly straightforward

matter. However, the HSE's handling of the request was among the poorest my Office has experienced in several years. The HSE issued no original or internal review decision to the applicant. During the FOI review, it made no submissions to my Office on the exemptions or public interest tests. Despite the fact that my Office issued it with a statutory notice requiring information, nobody within the HSE took responsibility for this case. It is incumbent on public bodies, including the HSE, to ensure that sufficient resources are in place to facilitate compliance with FOI legislation.

**95%** of reviews on hand at the end of 2016 were less than six months old

### Ms L and the Department of Finance - Case 150348

In this case the applicant submitted a request for correspondence between the Department and the management of the IBRC concerning the special liquidation process. The Department failed to issue an original decision or an internal review decision within the required time-frames.

The applicant expressed concerns as to the manner in which the Department processed her FOI request as well as possible resourcing issues within the Department that led to the delays. I noted in my decision that while it is a matter for the Department to ensure that it has afforded adequate resources to the FOI function, the administration of the FOI Act is a statutory function which should be afforded as much weight as any other statutory function. I also noted that in response to a PQ on the matter of resources and delays, the Minister for Finance had explained that there has been a significant increase in requests to the Department since the FOI Act 2014 came into force, many of which had been broad in terms of ambit and relate to complex issues. I welcomed the Minister's statement that additional decision makers were retained to work exclusively on the backlog of requests and the Department's decision to afford additional resources to the FOI function which I hoped would allow the Department to more readily meet the statutory time-frames in the future.

However, my decision was quite critical of the Department's handling of this request. The FOI Act provides that where an FOI body cannot meet the statutory time-frame for issuing a decision, the body is deemed to have refused the request and the requester is entitled to apply for an internal review. Similarly, where the body fails to issue an internal review decision within the required time-frame, the Act provides for an application for review to be submitted to this Office. Notwithstanding the fact that the Department has been subject to

FOI for almost eighteen years, it did not appear to have been aware of these provisions in this case.

In my decision I also pointed out that the applicant had rightly sought an internal review of the deemed refusal of her original request, but that rather than process the internal review request as such, the Department informed this Office that it was not possible to conduct an internal review within the required time-frame as the original decision had not been made at that stage. I also noted that when the decision eventually issued, it purported to represent an original decision and offered a right of internal review as opposed to a right of review by this Office. This was clearly incorrect. I drew the Department's attention to the support available from the Central Policy Unit (CPU) of the Department of Public Expenditure and Reform for FOI bodies. I also stated that I expected the Department to take note of my concerns and to put appropriate procedures in place to ensure that similar issues do not arise in the future.

## Ms M and TUSLA: Child and Family Agency – Case 160233

This case concerned an application for personal records from TUSLA: Child and Family Agency. TUSLA refused access to the records on the basis of section 15(1)(i) of the FOI Act, which provides that access to records may be refused where they have already been released to the same requester and the records are available to the requester concerned. In this case, the applicant had previously submitted requests for some of the records the subject of the review. Records had been released to her on those previous occasions. However, she stated that they were no longer available to her at the time of the review.

The Senior Investigator found that the records previously released to the requester were not available to her and that, thus, the conditions necessary for that provision to apply did not exist and section 15(1)(i) did not apply. However, he shared TUSLA's concerns regarding the applicant's failure to safeguard sensitive and personal records. He annulled the decision and directed TUSLA to make a fresh decision.

## Mr & Mrs X and National Asset Management Agency – Case 160078

The National Asset Management Agency (NAMA) is a partially included agency under the FOI Act 2014. Part 1(x)(iii) of Schedule 1 of the Act states that section 6 does not include a reference to NAMA, and certain other agencies, insofar as it relates to records concerning "purchasers or potential purchasers of any asset or loan or of any other asset securing loans held or managed by any of these bodies".

This was the first case addressing the question of whether records relating to the sale and purchase of an asset securing a loan, held or managed by NAMA, fell within Schedule 1, Part 1(x)(iii) of the FOI Act so that the Act did not apply to them. The question arose in the context of a request for access to records relating to the sale and purchase of Kilcooley Abbey Estate in Thurles, Co. Tipperary.

At the time of its sale and purchase, Kilcooley Abbey Estate was an asset securing a loan held or managed by NAMA. NAMA refused access to the majority of the records concerned on the basis that Schedule 1, Part(x)(iii) applied, but it did not challenge my jurisdiction to review the matter. In carrying out the review, my Office accepted that the Oireachtas has determined that the FOI Act does not apply to NAMA in relation to the records it holds which concern purchasers or potential purchasers of any asset or loan or of any other asset securing loans held or managed by NAMA. Based on an examination of the records concerned, my Office was satisfied that Schedule 1, Part 1(x)(iii) applied as claimed.

## Ms X and the Department of the Environment, Community and Local Government – Case 140108

In this case, the review was carried out under the provisions of the FOI Acts 1997 & 2003 notwithstanding the fact that the FOI Act 2014 has now been enacted. The transitional provisions in section 55 of the 2014 Act provide that any action commenced under the 1997 Act but not completed before the commencement of the 2014 Act shall continue to be performed and shall be completed as if the 1997 Act had not been repealed.

In November 2005, the State granted a lease to a private company under the Foreshore Act 1933 for the development of what was described by the Department as "a major strategic infrastructure project, an 1100 MW windfarm (200 turbines), at Codling Bank off the coast of County Wicklow". Previously, the company had been granted a foreshore licence for the purpose of allowing it to assess the suitability of the proposed Codling site for the construction of an off-shore electricity generating station. The question at issue in this case was whether the Department's decision to refuse to grant access to certain records concerning the project was justified under sections 26 (information obtained in confidence) and 27 (commercially sensitive information) of the FOI Act 1997.

In my decision, I noted that I do not accept, as a general matter, that information that a licensee is required to provide on the natural and archaeological resources of the State in relation to a proposed development of a major infrastructure project with significant environmental impacts, could properly be regarded as information of a confidential nature. I also did not accept that the State is obliged, as a matter of law, to treat as confidential the information that it requires in order to determine whether a particular foreshore site owned by the State is suitable for a major infrastructure development project such as a wind farm. Likewise, I did not accept that the Department could reasonably be expected, as a matter of law, to treat the terms and conditions governing the use of a public asset such as the foreshore of this country as confidential. Moreover, given the acknowledged importance of public participation in relation to environmental matters affecting the foreshore, I did not accept that an enforceable obligation of confidence may exist with respect to information relating to environmental conditions or to the environmental impacts of proposed activities in the foreshore.

In relation to the public interest, I had regard to the need for transparency and accountability in relation to the use of public property and public assets, as recognised in previous decisions of this Office. I also had regard to the public interest principles of openness and transparency recognised under the Access to Information on the Environment regime in relation to environmental matters. At the same time, I noted that the purpose of the public interest test is to strike a balance between competing interests insofar as they are relevant and that, generally speaking, the FOI Act was not designed as a means to open up the operations of private enterprises to scrutiny.

In the circumstances, I directed the release of bi-monthly reports containing information on the natural and archaeological resources of the foreshore site concerned, the records directly relating to the terms and conditions of the foreshore lease, and records relating to certain pre-construction surveys, while protecting certain other records containing details of the third party company's business operations and approach to the project, on the basis of section 26(1)(a) of the FOI Act.

## Mr X and Galway County Council – Case 160150

This case has its background in legal action taken by the applicant against the Council. The matter was handled by the Council's insurer and the case was settled out of court. The Council refused to release information relating to the settlement under section 15(1)(a) of the FOI Act on the ground that it held no relevant records containing that information.

The Council's position was that it had no formal record of the settlement reached and had no information relating to a breakdown of the monies paid, as the claim was handled in its entirety by its insurer and the settlement was paid by its insurer.

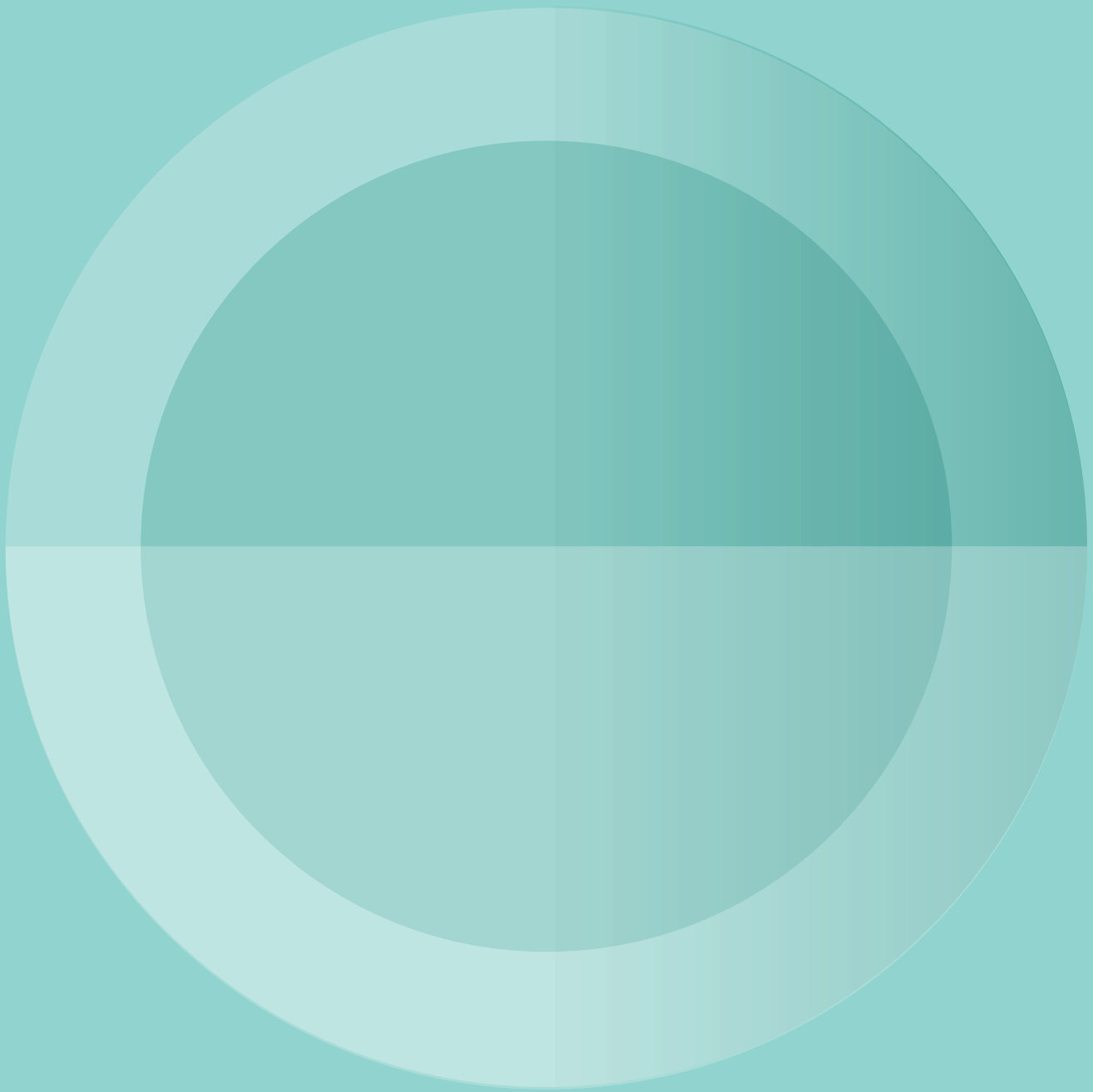
The question my Office had to consider was whether any relevant records that might be held by the Council's insurers might also be deemed to be held by the Council for the purposes of the FOI Act. Section 11(9) of the Act provides that a record in the possession of a service provider shall, if and in so far as it relates to the service, be deemed for the purposes of the FOI Act to be held by the FOI body. A service provider is defined, at section 2, as a person who, at the time the request was made, was not an FOI body but was providing a service for an FOI body under a contract for services.

The Council's insurance policy stated that, subject to certain specified limits, the insurer would indemnify the Council against all sums which it was legally liable to pay as damages in respect of accidental bodily injury to any person or accidental loss of or damage to property. The insurer was responsible for all costs and expenses of litigation recovered by any claimant in connection with any accident to which the indemnity expressed in the policy applies, again subject to certain specified limits. The policy further provided that the insurer would be entitled to take over and conduct in the name of the Council for its own benefit any claim and would have full discretion in the conduct of any proceedings and in the settlement of any claim.

My Office formed the view that any records held by the insurer relating to the applicant's claim were held by it in its own right. The contract that the Council had entered into with its insurer involved the indemnification of the Council by the insurer against valid claims. It was entirely a matter for the insurer to determine how it processes such claims. The Council had no role to play in such matters. For this reason, my Office did not accept that records relating to the processing of the applicant's claim that may be held by the insurer could reasonably be described, in the context of the FOI Act, as relating to a service that the insurer was providing for the Council as a service provider under a contract for services. Thus, my Office found that section 11(9) did not apply in this case and that the Council was justified in refusing the request on the ground that it held no relevant records.

Chapter 4:

# Statistics



# Chapter 4 Statistics

## Section I - Public Bodies - 2016



Figures for the above tables are supplied by the Department of Public Expenditure and Reform, the HSE, the Local Authorities FOI Liaison Group, the Department of Health, the National Federation of Voluntary Bodies and the Liaison Group for the Higher Education Sector, and collated by the Office of the Information Commissioner.

## Section II - Office of the Information Commissioner - 2016

# Section I – Public Bodies - 2016

## Table 1: Overview of FOI requests dealt with by public bodies

| | |
|---|---|
| **Requests on hand - 01/01/2016** | 5,337 |
| **Requests received in 2016** | |
| Personal | 18,119 |
| Non-personal | 12,031 |
| Mixed | 267 |
| **Total** | 30,417 |
| Total requests on hand during year | 35,754 |
| Requests dealt with | 29,736 |
| **Requests on hand - 31/12/2016** | 6,018 |

## Table 2: FOI requests dealt with by public bodies and subsequently appealed

| | Number | Percentage |
|---|---|---|
| FOI requests dealt with by public bodies | 29,736 | 100% |
| Internal reviews received by public bodies | 987 | 3% |
| Applications accepted by the Commissioner | 440 | 1.5% |

## Table 3: FOI requests received - by requester type

| Requester Type | Number | Percentage |
|---|---|---|
| Journalists | 6,819 | 22% |
| Business | 1,518 | 5% |
| Oireachtas Members | 503 | 2% |
| Staff of public bodies | 789 | 3% |
| Clients | 15,551 | 51% |
| Others | 5,237 | 17% |
| **Total** | **30,417** | **100%** |

## Table 4: Outcomes of FOI requests dealt with by public bodies

| Request Type | Number | Percentage |
|---|---|---|
| Requests granted | 15,073 | 51% |
| Requests part-granted | 6,665 | 22% |
| Requests refused | 4,008 | 13% |
| Requests transferred to appropriate body | 553 | 2% |
| Requests withdrawn or handled outside FOI | 3,437 | 12% |
| **Total** | **29,736** | **100%** |

## Table 5: Analysis of FOI requests dealt with by public service sector

| | granted | part granted | refused | transferred | withdrawn or handled outside of FOI |
|---|---|---|---|---|---|
| Civil Service departments | 31% | 33% | 19% | 3% | 14% |
| Local Authorities | 47% | 25% | 22% | 1% | 5% |
| HSE | 68% | 15% | 6% | 1% | 10% |
| Voluntary Hospitals, Mental Health Services Regulators and Related Agencies | 73% | 6% | 7% | 2% | 12% |
| Third Level Institutions | 51% | 25% | 12% | 0% | 12% |
| Other bodies | 56% | 27% | 11% | 0% | 6% |

## Table 6: FOI requests received by civil service Departments/Offices

| Civil Service Department/Office | Personal | Non-personal | Mixed | Total |
|---|---|---|---|---|
| Department of Social Protection | 1,848 | 231 | 10 | 2,089 |
| Department of Justice and Equality | 312 | 269 | 2 | 583 |
| Department of Education and Skills | 155 | 334 | 5 | 494 |
| Department of Finance | 4 | 401 | 0 | 405 |
| Department of Housing, Planning, Community and Local Government | 7 | 384 | 2 | 393 |
| Department of Public Expenditure and Reform | 91 | 258 | 0 | 349 |
| Department of Agriculture, Food and the Marine | 138 | 208 | 1 | 347 |
| Department of Health | 12 | 301 | 0 | 313 |
| Department of Transport, Tourism and Sport | 17 | 285 | 0 | 302 |
| Office of the Revenue Commissioners | 87 | 211 | 0 | 298 |
| Department of the Taoiseach | 5 | 270 | 0 | 275 |
| Department of Foreign Affairs and Trade | 22 | 192 | 0 | 214 |
| Department of Arts, Heritage, Regional, Rural and Gaeltacht Affairs | 5 | 164 | 0 | 169 |
| Department of Jobs, Enterprise and Innovation | 29 | 134 | 0 | 163 |
| Department of Communications, Climate Action and Environment | 3 | 156 | 0 | 159 |
| Department of Defence | 18 | 102 | 0 | 120 |
| Office of Public Works | 5 | 113 | 1 | 119 |
| Department of Children and Youth Affairs | 2 | 82 | 0 | 84 |
| Standards in Public Office Commission | 0 | 16 | 0 | 16 |
| Office of the Ombudsman | 11 | 4 | 0 | 15 |
| Commission for Public Service Appointments | 3 | 8 | 0 | 11 |
| Office of the Information Commissioner | 0 | 2 | 1 | 3 |
| **Total** | **2,774** | **4,125** | **22** | **6,921** |

## Table 7: FOI requests received by local authorities

| Local Authority | Personal | Non-personal | Mixed | Total |
|---|---|---|---|---|
| Dublin City Council | 163 | 349 | 0 | 512 |
| South Dublin County Council | 69 | 117 | 0 | 186 |
| Cork County Council | 1 | 175 | 0 | 176 |
| Dún Laoghaire/Rathdown County Council | 27 | 148 | 1 | 176 |
| Fingal County Council | 18 | 157 | 0 | 175 |
| Limerick City and County Council | 45 | 112 | 0 | 157 |
| Roscommon County Council | 5 | 141 | 4 | 150 |
| Cork City Council | 30 | 119 | 0 | 149 |
| Galway County Council | 2 | 138 | 6 | 146 |
| Meath County Council | 19 | 119 | 0 | 138 |
| Clare County Council | 17 | 106 | 5 | 128 |
| Kilkenny County Council | 3 | 124 | 0 | 127 |
| Galway City Council | 21 | 100 | 1 | 122 |
| Louth County Council | 40 | 80 | 0 | 120 |
| Mayo County Council | 4 | 114 | 0 | 118 |
| Kildare County Council | 24 | 80 | 5 | 109 |
| Wicklow County Council | 9 | 96 | 1 | 106 |
| Wexford County Council | 27 | 76 | 0 | 103 |
| Tipperary County Council | 16 | 81 | 4 | 101 |
| Waterford City and County Council | 24 | 77 | 0 | 101 |
| Donegal County Council | 16 | 83 | 0 | 99 |
| Kerry County Council | 8 | 86 | 0 | 94 |
| Leitrim County Council | 3 | 83 | 0 | 86 |
| Longford County Council | 3 | 81 | 0 | 84 |
| Monaghan County Council | 4 | 79 | 0 | 83 |
| Cavan County Council | 4 | 75 | 0 | 79 |
| Carlow County Council | 4 | 68 | 0 | 72 |
| Offaly County Council | 9 | 60 | 0 | 69 |
| Westmeath County Council | 6 | 62 | 1 | 69 |
| Laois County Council | 10 | 55 | 0 | 65 |

| | | | | |
|---|---|---|---|---|
| Sligo County Council | 12 | 52 | 0 | 64 |
| **Total** | **643** | **3,293** | **28** | **3,964** |
| Regional Assemblies | 0 | 3 | 0 | 3 |

## Table 8: FOI requests received by the HSE (excluding certain agencies covered in Table 9)

| HSE area* | Personal | Non-Personal | Mixed | Total |
|---|---|---|---|---|
| HSE South | 3,197 | 79 | 9 | 3,285 |
| HSE West | 2,688 | 269 | 1 | 2,958 |
| HSE Dublin North East | 938 | 109 | 3 | 1,050 |
| HSE Dublin Mid-Leinster | 791 | 57 | 1 | 849 |
| HSE National | 0 | 577 | 0 | 577 |
| **Total received** | **7,614** | **1,091** | **14** | **8,719** |

*Figures represent the regional structure of the HSE

## Table 9: FOI requests received by voluntary hospitals, mental health services regulators and related agencies

| Hospital/Service/Agency | Personal | Non-Personal | Mixed | Total |
|---|---|---|---|---|
| Tallaght Hospital | 801 | 33 | 0 | 834 |
| TUSLA: Child and Family Agency | 733 | 92 | 2 | 827 |
| St James's Hospital | 555 | 27 | 3 | 585 |
| Beaumont Hospital | 341 | 52 | 0 | 393 |
| Mater Misericordiae University Hospital | 334 | 25 | 0 | 359 |
| Our Lady's Hospital for Sick Children, Crumlin | 285 | 35 | 0 | 320 |
| Rotunda Hospital | 250 | 38 | 0 | 288 |
| St. Vincent's University Hospital | 237 | 33 | 1 | 271 |
| St. John's Hospital, Limerick | 203 | 15 | 0 | 218 |
| Temple Street Children's University Hospital | 171 | 30 | 0 | 201 |
| National Maternity Hospital, Holles Street | 164 | 16 | 0 | 180 |

| | | | | |
|---|---|---|---|---|
| South Infirmary/Victoria Hospital, Cork | 155 | 20 | 0 | 175 |
| Coombe Hospital | 123 | 11 | 0 | 134 |
| Cappagh Orthopaedic Hospital | 102 | 0 | 22 | 124 |
| Mercy Hospital, Cork | 94 | 22 | 0 | 116 |
| Hospitaller Order of St. John of God | 69 | 0 | 0 | 69 |
| National Rehabilitation Hospital, Dún Laoghaire | 54 | 1 | 0 | 55 |
| Central Remedial Clinic | 45 | 9 | 0 | 54 |
| Health Information & Quality Authority | 7 | 45 | 0 | 52 |
| St. Michael's Hospital, Dún Laoghaire | 27 | 19 | 0 | 46 |
| Medical Council | 19 | 14 | 2 | 35 |
| Royal Victoria Eye and Ear Hospital | 31 | 1 | 0 | 32 |
| Mental Health Commission | 19 | 9 | 0 | 28 |
| St. Vincent's Hospital, Fairview | 23 | 3 | 0 | 26 |
| Food Safety Authority of Ireland | 0 | 23 | 0 | 23 |
| Enable Ireland | 16 | 5 | 0 | 21 |
| Other Hospitals/Services/Agencies | 71 | 41 | 2 | 114 |
| **Total** | **4,929** | **619** | **32** | **5,580** |

## Table 10: FOI requests received by third-level education institutions

| Third Level Education Body | Personal | Non-Personal | Mixed | Total |
|---|---|---|---|---|
| University College Dublin | 45 | 65 | 1 | 111 |
| University of Limerick | 11 | 92 | 8 | 111 |
| National University of Ireland Galway | 36 | 49 | 0 | 85 |
| University College Cork | 12 | 50 | 2 | 64 |
| Trinity College Dublin, the University of Dublin | 5 | 47 | 2 | 54 |
| Dublin City University | 6 | 42 | 0 | 48 |
| National University of Ireland Maynooth | 8 | 24 | 0 | 32 |
| Galway-Mayo Institute of Technology | 9 | 21 | 1 | 31 |
| Dublin Institute of Technology | 8 | 23 | 0 | 31 |
| Waterford Institute of Technology | 3 | 20 | 4 | 27 |
| Athlone Institute of Technology | 7 | 13 | 1 | 21 |

| | | | | |
|---|---|---|---|---|
| Royal College of Surgeons in Ireland | 6 | 14 | 0 | 20 |
| Other bodies | 11 | 116 | 3 | 130 |
| **Total** | **167** | **576** | **22** | **765** |

## Table 11: FOI requests received by other bodies

| Public body | Personal | Non-Personal | Mixed | Total |
|---|---|---|---|---|
| Irish Prison Service | 682 | 96 | 0 | 778 |
| An Garda Síochána | 122 | 333 | 4 | 459 |
| Defence Forces Ireland | 184 | 80 | 1 | 265 |
| Social Welfare Appeals Office | 248 | 0 | 0 | 248 |
| Houses of the Oireachtas Service | 8 | 226 | 0 | 234 |
| Health and Safety Authority | 10 | 26 | 136 | 172 |
| RTÉ | 12 | 154 | 0 | 166 |
| Irish Water | 40 | 120 | 0 | 160 |
| Courts Service | 77 | 78 | 0 | 155 |
| Public Appointments Service | 70 | 20 | 1 | 91 |
| Central Bank of Ireland | 7 | 61 | 2 | 70 |
| National Asset Management Agency | 2 | 64 | 0 | 66 |
| National Transport Authority | 44 | 2 | 1 | 47 |
| National Treasury Management Agency | 4 | 40 | 1 | 45 |
| Environmental Protection Agency | 0 | 39 | 5 | 44 |
| IDA Ireland | 0 | 44 | 0 | 44 |
| Central Statistics Office | 14 | 29 | 0 | 43 |
| Transport Infrastructure Ireland | 1 | 41 | 0 | 42 |
| Property Registration Authority | 30 | 10 | 0 | 40 |
| Eirgrid | 0 | 36 | 0 | 36 |
| Enterprise Ireland | 0 | 35 | 0 | 35 |
| SOLAS | 12 | 22 | 0 | 34 |
| ESB Networks | 6 | 28 | 0 | 34 |
| Commission for Communications Regulation | 12 | 20 | 1 | 33 |
| Caranua | 20 | 13 | 0 | 33 |

| | | | | |
|---|---|---|---|---|
| Pobal | 1 | 32 | 0 | 33 |
| Road Safety Authority | 6 | 26 | 1 | 33 |
| Garda Síochána Ombudsman Commission | 24 | 7 | 0 | 31 |
| Office of the Director of Public Prosecutions | 17 | 14 | 0 | 31 |
| Fáilte Ireland | 2 | 28 | 1 | 31 |
| Arts Council | 1 | 29 | 0 | 30 |
| State Examinations Commission | 14 | 16 | 0 | 30 |
| Other bodies (93 bodies with fewer than 30 requests each) | 206 | 496 | 22 | 724 |
| **Total** | **1,876** | **2,265** | **176** | **4,317** |

# Section II - Office of the Information Commissioner – 2016

## Table 12: Analysis of applications for review received

| | |
|---|---|
| Applications for review on hand - 01/01/2016 | 19 |
| Applications for review received in 2016 | 577 |
| **Total applications for review on hand in 2016** | **596** |
| Applications discontinued | 4 |
| Invalid applications | 91 |
| Applications settled | 12 |
| Applications withdrawn | 10 |
| Applications rejected | 5 |
| Applications accepted for review in 2016 | 440 |
| **Total applications for review considered in 2016** | **562** |
| **Applications for review on hand - 31/12/2016** | **34** |

## Table 13: Analysis of review cases

| | |
|---|---|
| Reviews on hand - 01/01/2016 | 125 |
| Reviews accepted in 2016 | 440 |
| **Total reviews on hand in 2016** | **565** |
| Reviews completed in 2016 | 433 |
| **Reviews carried forward to 2017** | **132** |

## Table 14: Applications for review accepted in 2016

| | | |
|---|---|---|
| Health Service Executive | | 89 |
| HSE South | 26 | |
| HSE West | 22 | |
| HSE National | 18 | |
| HSE Dublin North East | 14 | |
| HSE Dublin Mid-Leinster | 9 | |
| | | |
| TUSLA: Child and Family Agency | | 38 |
| Department of Justice and Equality | | 24 |
| RTÉ | | 18 |
| Defence Forces Ireland | | 11 |
| Department of Social Protection | | 11 |
| Irish Prison Service | | 11 |
| Department of Agriculture, Food and the Marine | | 9 |
| St James's Hospital | | 9 |
| Athlone Institute of Technology | | 8 |
| University College Cork | | 8 |
| An Garda Síochána | | 7 |
| Department of Housing, Planning, Community and Local Government | | 7 |
| Dublin City Council | | 7 |
| University College Dublin | | 6 |
| Others (bodies with fewer than 6 applications each) | | 177 |
| **Total** | | **440** |

## Table 15: Outcome of completed reviews - 3-year comparison

| | 2016 | | 2015 | | 2014 | |
|---|---|---|---|---|---|---|
| Decision affirmed | 179 | 42% | 110 | 34% | 154 | 45% |
| Decision annulled | 36 | 8% | 37 | 12% | 17 | 5% |
| Decision varied | 70 | 16% | 59 | 18% | 31 | 9% |
| Discontinued | 14 | 3% | 10 | 3% | 19 | 6% |
| Settlement reached | 88 | 20% | 69 | 21% | 74 | 22% |
| Withdrawn | 46 | 11% | 38 | 12% | 45 | 13% |
| **Reviews completed** | **433** | **100%** | **323** | **100%** | **340** | **100%** |

## Table 16: Subject matter of review applications accepted - 3-year comparison

| | 2016 | | 2015 | | 2014 | |
|---|---|---|---|---|---|---|
| Refusal of access | 403 | 91% | 299 | 90% | 211 | 84% |
| Objections by third parties to release information about them or supplied by them | 8 | 2% | 15 | 5% | 8 | 3% |
| Amendment of records under section 9 | 13 | 3% | 4 | 1% | 7 | 3% |
| Statement of reasons under section 10 | 12 | 3% | 11 | 3% | 24 | 9% |
| Decision to charge a fee | 4 | 1% | 3 | 1% | 2 | 1% |
| **Total** | **440** | **100%** | **332** | **100%** | **252** | **100%** |

## Table 17: Applications accepted by type - 3-year comparison

| | 2016 | | 2015 | | 2014 | |
|---|---|---|---|---|---|---|
| Personal | 146 | 33% | 109 | 33% | 110 | 44% |
| Non-personal | 242 | 55% | 167 | 50% | 108 | 43% |
| Mixed | 52 | 12% | 56 | 17% | 34 | 13% |
| **Total** | **440** | **100%** | **332** | **100%** | **252** | **100%** |

## Table 18: General enquiries

| Year | Number |
|---|---|
| 2016 | 1,307 |
| 2015 | 1,462 |
| 2014 | 1,274 |
| 2013 | 1,218 |
| 2012 | 1,262 |
| 2011 | 824 |
| 2010 | 622 |
| 2009 | 857 |
| 2008 | 1,100 |
| 2007 | 1,315 |

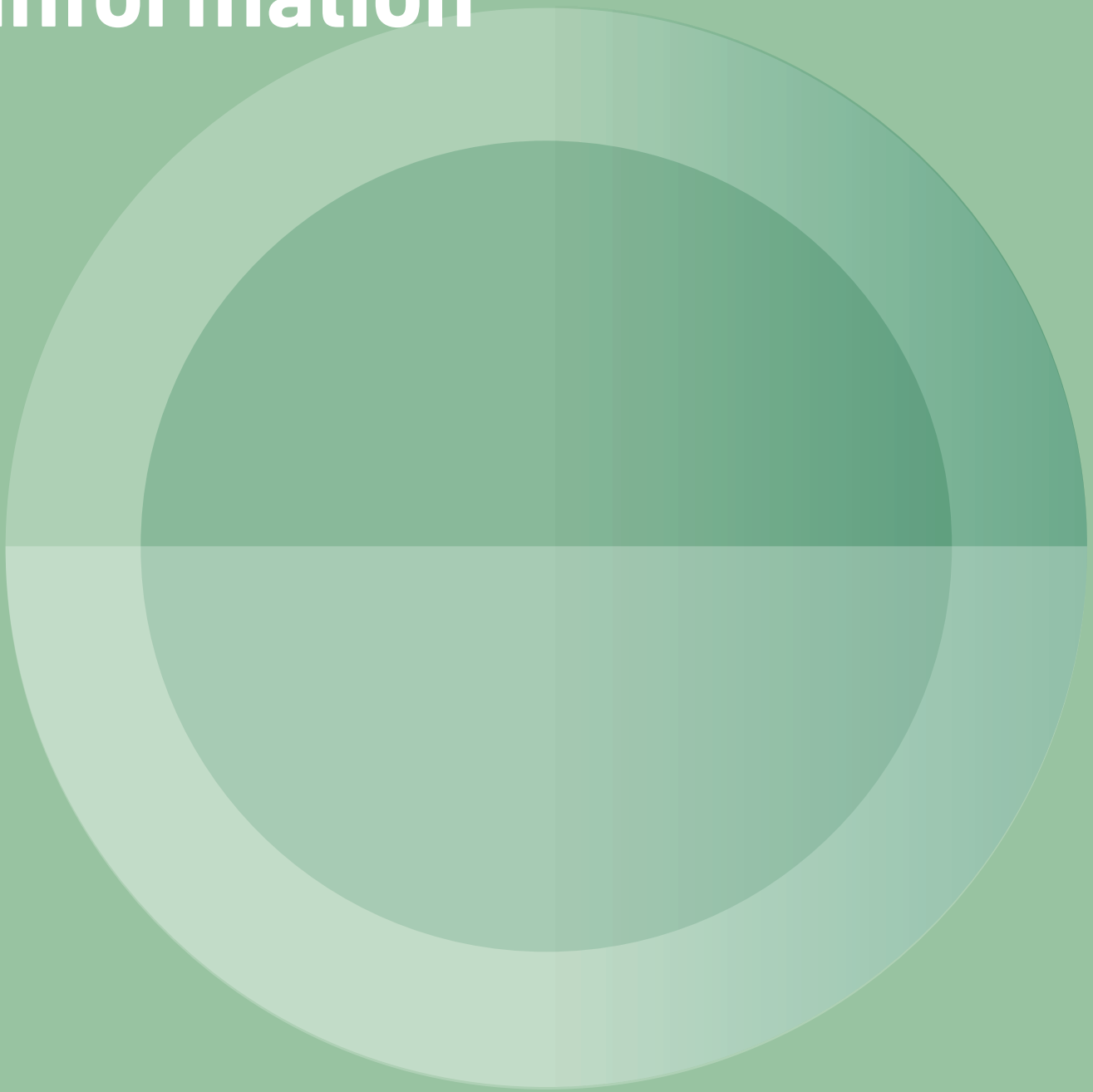
## Table 19: Deemed refusals due to non-reply by public bodies

| Deemed refusal of original and internal review decisions | | | |
|---|---|---|---|
| **Public Body** | **2016** | **2015** | **2014** |
| TUSLA: Child and Family Agency | 20 | 7 | 3 |
| Department of Justice and Equality | 8 | 7 | 3 |
| RTÉ | 8 | - | - |
| HSE South | 7 | 5 | 5 |
| HSE National | 6 | 4 | 6 |
| HSE West | 6 | 7 | 3 |
| Irish Prison Service | 6 | - | - |
| St James's Hospital | 5 | - | 1 |
| University College Cork | 4 | 4 | - |
| Defence Forces Ireland | 2 | - | - |
| Department of Agriculture, Food and the Marine | 2 | 1 | - |
| Department of Health | 2 | - | - |
| Dublin City Council | 2 | - | - |
| HSE Dublin North East | 2 | - | 1 |

| | | | |
|---|---|---|---|
| University College Dublin | 2 | 1 | - |
| Waterford Institute of Technology | 2 | - | - |
| other Bodies - 1 each | 21 | | |
| **Total 2016** | **105** | | |

Part II

# Commissioner for Environmental Information



# Introduction

My role as Commissioner for Environmental Information is to review decisions of public authorities on appeal by applicants who are not satisfied with outcomes of requests made under the European Communities (Access to Information on the Environment) Regulations 2007 to 2014 (the AIE Regulations). In 2016, the Office of the Commissioner for Environmental Information (OCEI) processed more cases than ever before, while responding to a recent upsurge in appeals under the AIE Regulations.

The AIE Regulations transpose Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information. Directive 2003/4/EC implements the first pillar of the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention").

The right of access to information under the AIE Regulations applies to "environmental information" held by or for a "public authority". These two terms have specific meanings defined by article 3(1) of the AIE Regulations. My decisions on appeals are final and binding on the affected parties, unless a further appeal is made to the High Court on a point of law within two months of the decision concerned.

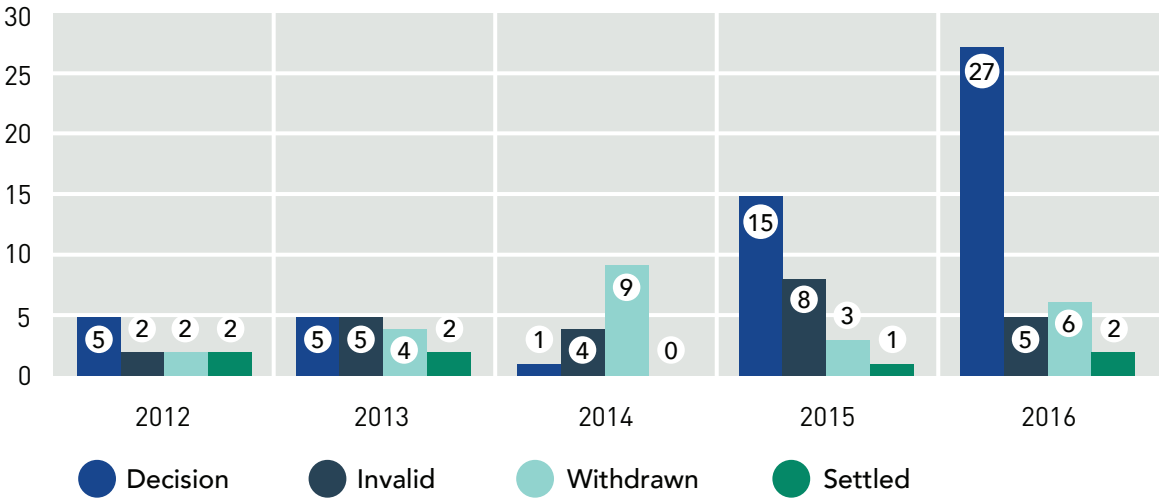
The OCEI is legally separate from the Office of Information Commissioner (OIC); however article 12(10) of the AIE Regulations provides that the Commissioner for Environmental Information shall be assisted by the staff of the Office of the Information Commissioner and by such other resources as may be available to that Office.

For further information on the operation of the AIE regime in Ireland, please visit my website at **www.ocei.ie**, which includes links to the previous Annual Reports of this Office, the OCEI Procedures Manual, the website of the Department of Communications, Climate Action and the Environment, and Directive 2003/4/EC.

## Appeals and enquiries in 2016

At the start of 2016, the OCEI had 27 appeals on hand; 22 from 2015, four from 2014 and one from 2013. In 2016, the OCEI received 52 new appeals (equivalent to the combined number of appeals received in 2014 and 2015). The OCEI closed 40 cases in 2016: I made 27 formal decisions, five appeals were invalid, six cases were withdrawn, and two cases were settled.

### OCEI Appeal Outcomes 2012 -2016




At the end of 2016, the OCEI had 39 valid appeals on hand – 36 received in 2016, and three from 2015. At the time of writing, the outstanding 2015 cases are being progressed by Investigators. My staff recorded 27 general enquiries about the AIE Regulations in 2016. In 2016, my Office processed three AIE requests, and one of these decisions was the subject of an internal review.

## Deemed refusals in 2016

The AIE Regulations include fixed time limits for decisions and internal review decisions by public authorities on AIE requests. A request is deemed to be refused when the public authority fails to issue a decision within the relevant time limit specified in the AIE Regulations (usually one month).

In 2016, eight public authorities failed to make first instance decisions on AIE requests within the time specified by the AIE Regulations. The public authorities were: the Commission for Energy Regulation; the Department of Agriculture, Food and the Marine; Dublin City Council; the Electricity Supply Board; the Environmental Protection Agency; Gas Networks Ireland; the Health Service Executive; and the Industrial Development Board.

In 2016, seven public authorities failed to make internal review decisions within the time specified by the AIE Regulations. The public authorities were: Coillte; the Courts Service; the Department of Agriculture, Food and the Marine; Eirgrid; Gas Networks Ireland; the Health Service Executive; and Transport Infrastructure Ireland.

## Powers under article 12(6) of the AIE Regulations

Article 12(6) of the AIE Regulations provides that in the course of carrying out a review on appeal I may require a public authority to make environmental information available to me, examine and take copies of environmental information held by a public authority, and enter any premises occupied by a public authority so as to obtain environmental information. I am pleased to report that I had no need to apply these powers in 2016.

## 2016 Court Proceedings

### Redmond & Anor -v- Commissioner for Environmental Information 2016/27 JR

In my decision in the case of Mr Jim Redmond and Coillte Teoranta (CEI/14/0011) I found that certain information on a transfer of land did not fall within the scope of the AIE Regulations. This decision is the subject of an ongoing judicial review in the High Court, and is listed for hearing on 3 October 2017.

### Minch -v- Commissioner for Environmental Information [2016] IEHC 91

In the case of Mr. Stephen Minch and the Department of Communications, Energy and Natural Resources (CEI/13/0006), I found that an economic report entitled "Analysis of options for potential State intervention in the roll out of next-generation broadband" did not, of itself, contain environmental information. I also considered whether this report contained analyses or assumptions used in the framework of a measure likely to affect the environment (the National Broadband Plan in this case). I considered that the link between the National Broadband Plan and any effect on the environment was too remote. I therefore found that the Department was justified in refusing to provide access to the report.

Mr Minch appealed my decision to the High Court. In a judgment delivered on 16 February 2016, the High Court applied the Supreme Court judgment in NAMA v Commissioner for Environmental Information [2013] IEHC 86 in adopting a purposive interpretation of the AIE Regulations. The Court held that "analyses and assumptions used within the framework" of a measure included information of a type which was "capable of informing" a decision-maker. The Court held that information "used within the framework of a measure" is not limited to information which was available at the time a particular report was written. The Court found that the remoteness test applied in my original decision was incorrect, as it was too narrow.

In particular, the Court held that the remoteness test applied did not take into account measures, programmes, or policies which were likely to affect the environment. The Court indicated that the matter should be remitted to my Office for a new decision.

I have appealed from certain parts of this judgment to the Court of Appeal, and the matter is listed for hearing on 16 June 2017.

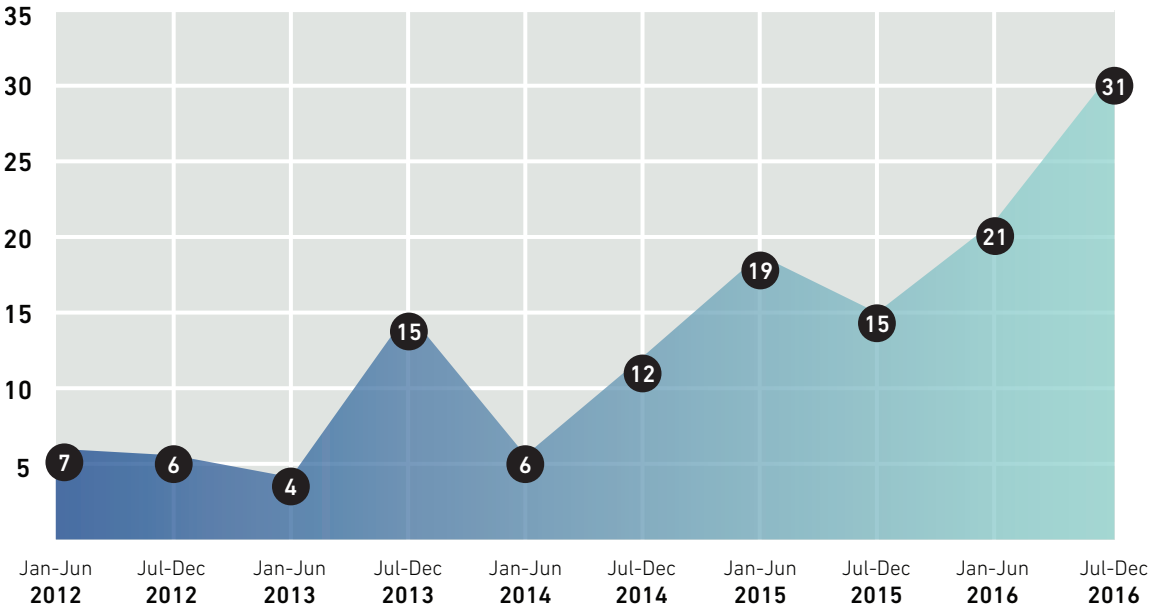
## Issues arising in 2016

### Increased number of appeals made to the OCEI

It has been the experience of the OCEI that AIE appeals are often more complex and resource-intensive than FOI appeals. In recent years, appeals to my Office have been subject to delays due to a lack of available resources, and a significant backlog of appeals developed. To address this problem, I made a successful budget submission in 2014 to the Department of Public Expenditure and Reform seeking additional staff to meet the operational needs of the OCEI. Following an open recruitment process, two Investigators were appointed in June 2015 to work specifically on OCEI appeals.

The expanded staffing of my Office has facilitated a marked increase in the number of appeals processed on an annual basis. In 2016, I made 27 formal decisions on appeals (more than the four previous years combined). However, despite this progress, the backlog of cases awaiting investigation increased throughout 2016.

### AIE Appeals received 2012 - 2016



It is now clear that since 2014 there has been an unprecedented surge in the number of AIE requests made to Irish public authorities. According to statistics available on the website of the Department of Housing, Planning, Community and Local Government, 374 AIE requests were made to Irish public authorities in 2013. By 2015, this number had increased to 658 AIE requests. While I welcome greater public awareness of the right of access to environmental information, this two-fold increase in requests for environmental information has had a corresponding effect on the number of appeals to my Office, which has increased by 280% since 2014.

As a result of this greatly increased level of demand there is now a clear shortfall in OCEI capacity to process appeals. In particular, substantial delays arise between acceptance of appeals and the availability of an OCEI Investigator. To address this, I have commenced recruitment of additional staff to ensure that I can carry out my statutory functions effectively.

## Engagement with the Department of Communications, Climate Action and Environment

In October 2016, the Senior Investigator in my Office participated in an AIE Advisory Group organised by the Department of Communications, Climate Action and Environment. This group included external stakeholders and non-governmental organisations and focussed on potential improvements and reforms of national law on access to environmental information.

In October the Department also ran an AIE training event for public authority staff. An Investigator in my Office made a presentation on OCEI appeal decisions and drew attention to online resources. As in recent years, the training provided clear and useful information to public authority staff on the AIE Regulations, and I would like to thank the Department for its continued work in this regard.

I look forward to further engagement with the Department in 2017 on the publication of revised guidelines on access to information on the environment, and on other issues of mutual concern.

## Communication to the Aarhus Convention Compliance Committee (ACCC/C/2016/141)

In August 2016, Right to Know CLG (an Irish advocacy group concerned with public access to information) made a communication to the Aarhus Convention Compliance Committee (ACCC/C/2016/141) in relation to aspects of Ireland's compliance with the Convention. This communication included references to delays in processing AIE appeals by the OCEI, as well as commentary on OCEI procedures. The Department of Communications, Climate Action and Environment is responsible for submitting statements to the Compliance Committee in

response to this communication. My Office provided the Department with information on the work of the OCEI to inform the Department's statements, and I will continue to monitor this process as appropriate.

### 2016 Judgments of the Court of Justice of the European Union

Article 10(1) of the AIE Regulations prevents the application of certain exceptions to disclosure where a request "relates to information on emissions into the environment."

In its judgments in the cases of Bayer CropScience SA-NV, Stichting De Bijenstichting v College voor de toelating van gewasbeschermingsmiddelen en biociden (Case C-442/14) and Commission v Stichting Greenpeace Nederland and PAN Europe (Case C-673/13 P), the Court of Justice of the European Union clarified the meaning of "emissions into the environment" in the context of plant protection products and biocides. The Court held that the term "emissions into the environment" covers the actual or foreseeable release of substances under normal or realistic conditions of use. The Court did not limit the concept of emissions to those of industrial installations.

The Court held that information on "emissions into the environment" includes information regarding the nature, composition, quantity, date and place of the emissions, but also includes information enabling the public to check whether an official assessment of actual or foreseeable emissions is correct, data concerning the medium to long-term consequences of those emissions on the environment, and information on residues of emissions and drift of emissions.

In Case C-673/13 P, the Court set aside an earlier finding of the General Court that the scope of information relating to emissions included information linked in a "sufficiently direct manner" to such emissions. The CJEU held instead that information which relates to emissions must actually concern or be relevant to such emissions, and does not include information having any link at all, direct or indirect, to emissions into the environment.

## Significant decisions in 2016

### Summary of decision outcomes in 2016

In 2016 I made 27 formal decisions on appeals under the AIE Regulations. In 19 of these cases I found that a refusal of a request was (to some extent) not justified. In 12 of the 27 decisions I required the public authority to provide access to some or all of the environmental information requested. In 9 cases, I stated that the public authority should make a new decision on the request. In 8 appeals I found that refusal of the appellants' requests was justified in full (although not always for the same reasons provided by the public authority). All of my decisions in 2016 are published on the OCEI website.

The following are notable examples from 2016 of decisions where I required public authorities to make environmental information available to applicants.

In Galway Bay Against Salmon Cages and the Marine Institute (CEI/15/0013) I considered a request for access to information on pancreas disease in farmed salmon. I found that the commercial interests served by refusal of the appellant's request were outweighed by the public interest in transparent regulation of the fish farming industry. I required the Marine Institute to provide access to the information requested.

In Francis Clauson and ESB Networks Limited (CEI/15/0029) I considered a request for access to information on the power output of an electricity generation facility. This information was held by ESB Networks, the statutory authority with responsibility for the national power distribution system. I found that, although disclosure of the information would adversely affect commercial and industrial confidentiality, this interest was outweighed by the strong public interest in the transparent operation of renewable energy policy and related price support mechanisms.

In Fand Cooney and ESB Networks Limited (CEI/15/0002) I reviewed a refusal by ESB Networks to provide access to information on a power transmission project in Portlaoise. I reviewed an "investment appraisal" document on the project, and found that it contained environmental information (as defined by the AIE Regulations). I found that ESB Networks was not obliged to disclose information on the cost of the project, as this would adversely affect commercial confidentiality. Notwithstanding this decision, I required ESB Networks to make other parts of the appraisal document available to the appellant, where commercial confidentiality did not apply.

In Damien McCallig and the Department of Communications, Climate Action and Environment (CEI/15/0032), I reviewed the Department's refusal to provide access to modelling data used to inform the development of wind energy policy. The Department contended that this information related to an ongoing deliberative process. It submitted that disclosure of the information would adversely affect the confidentiality of the proceedings of public authorities for the purposes of article 8(a)(iv). I considered that the information at issue did not, of itself, disclose the outcome of a decision. I therefore found that release was not likely to prejudice a decision-making process. I also noted the strong public interest in providing members of the public an opportunity to make well informed submissions on environmental decisions.

## Manifestly unreasonable requests, and requests formulated in too general a manner

A number of appeals in 2016 concerned requests which were formulated in too general a manner and requests which were manifestly unreasonable having regard to the volume and range of information sought. Articles 9(2)(a) and (b) of the AIE Regulations provide that public

authorities may refuse such requests. Where appropriate, public authorities should consider these grounds for refusal as preliminary matters when processing AIE requests.

## Requests formulated in too general a manner

Under article 7(8) of the AIE Regulations, where a request is made in too general a manner, the public authority is obliged to invite the applicant to make a more specific request as soon as possible, and must offer assistance to the applicant in the preparation of such a request. Article 9(2)(b) provides that a public authority may refuse to make environmental information available where a request remains formulated in too general a manner, taking into account article 7(8).

In the case of Councillor Thomas Cullen and the Department of Environment, Community and Local Government (CEI/15/0018), I noted that the AIE Regulations do not oblige public authorities to process overly general requests for information. Requests should be reasonably limited with regard to subject matter where possible. In this case, the appellant's AIE request sought access to *"All information relating to documentation submitted to your department by [a named third party]. All letters sent and received, E mails external & internal, all memos, minutes and dates of meetings, all records and notes of phone conversations and all such information that is in your possession relating to [the named third party's] correspondence with your Minister and Department."* In response, the Department invited the appellant to make a more specific request, and suggested that he should include details of relevant subject matters and time periods. The appellant declined to make a more specific request. On appeal, I subsequently found that the Department was justified in refusing the request under article 9(2)(b).

## Manifestly unreasonable requests for environmental information

Article 9(2)(a) of the AIE Regulations provides that a request may be refused if it is manifestly unreasonable in terms of the volume or range of information sought. This ground for refusal must be interpreted in light of article 7(2)(b), which provides that a public authority may extend the time for making a decision by up to one month if the volume or complexity of the request requires this. Where a public authority cannot reasonably process a request within the extended two month timeframe it may be appropriate to consider refusal on the basis that the request is manifestly unreasonable. As with all exceptions to disclosure under articles 8 and 9, this ground for refusal is subject to a public interest test under article 10(3).

In 2016, a number of appeals to my Office were determined on the basis of this ground for refusal. For example, in the case of Ms Mary Horan, Ms Margaret Mulligan and Mr Frank Mulligan and ESB Networks (CEI/14/0009), the appellants sought access to *"copies of: all correspondence/ documentation/pieces of paper generated, and all information known by you, that in any and all ways relate to the entire cost of The Srananagh Station Project ('the Project') . . . including but not limited to original costings for project, compensation to all affected landowners, cost of all construction works, and any and all costs associated with the*

*project, including legal fees and consultation fees".* ESB Networks contended that this request was manifestly unreasonable, as it sought to access information on hundreds of discrete transactions which took place over many years, as well as the cost of related litigation. Given the all-encompassing wording of the appellants' request, and having had regard to the volume and range of information requested, I found that refusal was justified on the basis that the request was manifestly unreasonable with regard to volume and range.

While I appreciate that an applicant may not know the extent of information held by or for a public authority, making a universal AIE request may be counterproductive and can lead to refusal where an unmanageable amount of information falls within the scope of the request. I would strongly encourage applicants and public authorities to engage on the scope of requests at the outset to avoid the need for refusal under article 9(2)(a).

## Decisions on the definition of environmental information

Article 3(1) of the AIE Regulations defines "environmental information" for the purposes of the AIE Regulations. The definition includes any information on six broad subject matters pertaining to the environment, including any information on measures or activities affecting or likely to affect the elements of the environment. In many cases before me, public authorities refuse AIE requests on the basis that the information sought falls outside the definition of environmental information. I wish to emphasise that information need not describe the elements of the environment directly in order to fall within the AIE Regulations; therefore, public authorities should have regard to the full extent of the definition when considering AIE requests. I anticipate that the Court of Appeal will provide further clarity on the definition of environmental information in 2017, following the hearing of the *Minch* case on appeal.

In 2016, I set out my view on the scope of the definition of environmental information in the case of Ken Foxe and the Department of Defence (CEI/15/0007). This appeal related to information on official travel using State owned aircraft. Bearing in mind the aims of the Aarhus Convention, I concluded that information which describes integral aspects of an activity affecting the environment can be said to have a sufficient connection to environmental factors for the purposes of the definition, even where such information does not of itself directly reflect the state of the elements of the environment. In the same decision, I found that incidental information which does not define the conduct of an activity under consideration (such as lists of passenger names in this case) falls outside the scope of the AIE definition.

In my decision in the case of Ms Mary Horan, Ms Margaret Mulligan and Mr Frank Mulligan and ESB Networks (CEI/14/0009) I found that information on the entire cost of a major energy infrastructure development project was integral information on that project, disclosure of which would facilitate accountability of and transparency in a measure affecting the environment. I therefore found that the requested information fell within the definition of "environmental information".

Conversely, in the case of Phillip Cantwell and Meath County Council (CEI/15/0021) I found that fragmentary information on project costs (as set out in individual invoices, requisitions for cheques and descriptions of interim payments) did not fall within the definition, as this information was not integral to the measure under consideration for the purposes of the AIE Regulations.

## Transfer of AIE Requests

Under article 7(5) of the AIE Regulations, where a request is made to a public authority and the information requested is not held by or for the authority concerned, that authority must inform the applicant of this fact as soon as possible.

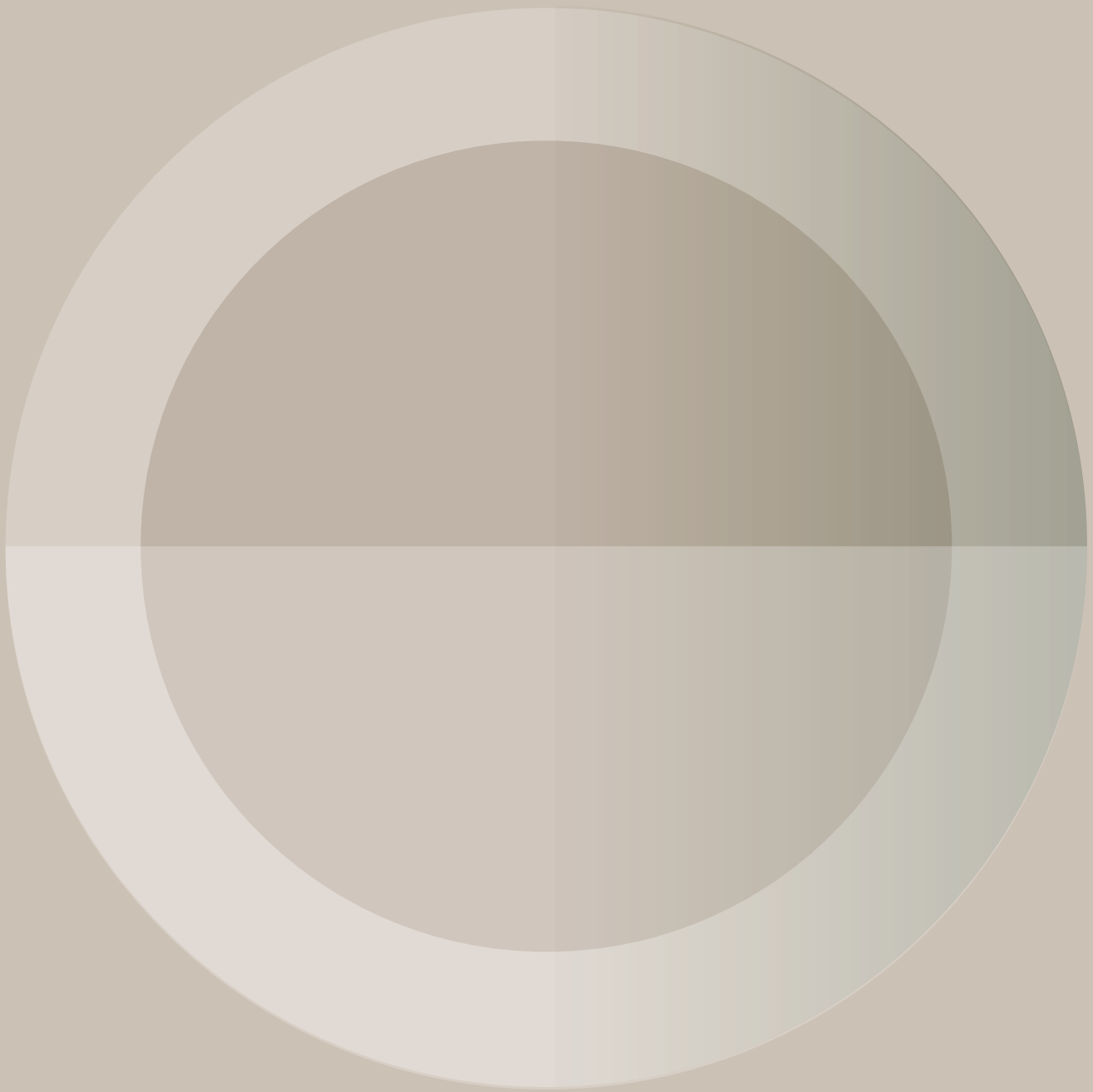
Under article 7(6), where no relevant information is held by or for a public authority, but it is aware that the information requested is held by another public authority, it must transfer the request to the other public authority, or inform the applicant of the public authority to whom it believes the request should be directed. It is important to note that these two provisions are linked – it is only possible to transfer a request where the information sought is not held.

In the case of Mr Thomas Freeman and Electricity Supply Board (CEI/16/0010), an AIE request was made to the Electricity Supply Board, a statutory corporation established under the Electricity (Supply) Act 1927. However, the decision on this request issued from a separate public authority: a ring-fenced subsidiary of the ESB called ESB Networks Limited. In its submission to my Office, the ESB explained that it operated a shared service for processing AIE requests across all its subsidiary companies, by which AIE requests are forwarded to a central coordinator who then directs the request to whichever ESB subsidiary is likely to hold the information.

In the circumstances, I found that ESB was not justified in its purported transfer of the appellant's request. Members of the public have discretion to direct an AIE request to a public authority of their own choosing, and the obligation to reply to an AIE request falls on the public authority selected by the applicant. A public authority may not transfer a request to a different public authority, except as provided in articles 7(5) and (6).

In my decision, I acknowledged the complexity of the regulatory and contractual arrangements between the bodies which make up the ESB Group; however, I nevertheless consider that each public authority within the group must individually comply with the provisions of the AIE Regulations.

# Appendices



# Appendix I

## Statutory Certificates issued by Ministers in 2016

An Roinn Gnóthaí Eachtracha agus Trádála
Department of Foreign Affairs and Trade

Ombudsman and
Information Commissioner
08 FEB 2017
Received

13 January 2017

Ms Jacqui McCrum

Director General

Office of the Information Commissioner

18 Lower Leeson Street

Dublin 2

Notification under Section 34 of the Freedom of Information Act 2014

Dear Ms McCrum

I refer to your recent letter on the above.

On 23rd November 2016 the Minister for Foreign Affairs and Trade issued three certificates in accordance with Section 34 of the Freedom of Information Act 2014 by reference to which the records are exempted under Section 32 and Section 33. The certificates related to three requests for the same set of records.

Please find enclosed copies of the certificates issued in 2016.

Yours sincerely

Fiona Flood

Director

Security, Coordination and Compliance

# Appendix I

**AN ROINN DLÍ agus CIRT agus COMHIONANNAIS**
*51 Faiche Stiabhna*
*Baile Átha Cliath 2*
Teileafón/Telephone: (01) 602 8202
Ríomhphoist/e-mail: foi@justice.ie

**DEPARTMENT OF JUSTICE and EQUALITY**
*51 St. Stephen's Green*
*Dublin 2*
*Eircode : D02 HK52*
Facsuimhir/Fax: (01) 661 5461

Ombudsman and Information Commissioner
20 JAN 2017
Received

Ms Jacqui McCrum
Director General
Office of the Information Commissioner
18 Lower Leeson Street
Dublin 2

17 January 2017

Dear Ms. McCrum,

I wish to refer to your letter of 9 January 2017 regarding Ministerial Certificates. The Department of Justice and Equality have 9 Ministerial Certificates.

4 certificates were renewed in 2016 and 2 new certificates was issued. For the sake of completeness, copies of all are attached.

Yours sincerely,

Noel Waters
Secretary General

# Appendix II

## Review under section 34(7) of Ministerial Certificates issued

Roinn an Taoisigh
Department of the Taoiseach

9th December 2016

ACKNOWLEDGED
14 DEC 2016
Office of the Ombudsman

Mr. Peter Tyndall,
Information Commissioner,
Office of the Information Commissioner,
18 Lower Leeson Street,
Dublin D02 HE97

**Re: Review of Certificates issued under Section 34 of the Freedom of Information Act, 2014**

Dear Commissioner,

I would like to confirm that, pursuant to the above Act, the Taoiseach, the Minister for Public Expenditure and Reform and the Minister for Jobs, Enterprise and Innovation carried out a review of the operations of the Act, for the period ended 1st August 2016 on 6th December 2016.

Thirteen Certificates were reviewed, seven of which were issued by the Minister for Justice and Equality and six by the Minister for Foreign Affairs and Trade.

The Taoiseach, the Minister for Public Expenditure and Reform and the Minister for Jobs, Enterprise and Innovation are satisfied that it is not necessary to request revocation of any of the thirteen certificates which were the subject of this review - copies of the forms signed by the reviewers to that effect are enclosed.

Yours sincerely,

Marc McManus
Department of the Taoiseach

Enc:

c.c. D/J&E, D/FA&T, D/JE&I, D/PER

Tithe an Rialtais, Baile Átha Cliath 2.
Government Buildings, Dublin 2.

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